Supreme Court, U.S.
FILED
99 643 OCT 13 1999
OFFICE OF THE CLERK

No. 99-

IN THE
Supreme Court of the United States

WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
and FAIRHAVEN EDUCATORS' ASSOCIATION,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION,
DAVID DUPUIS, ELEANOR DUPUIS, BETSY ANN WOOD,
CHARLES CIPOLLINI, and PETER ANTHONY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

ANN CLARKE
Massachusetts Teachers Ass'n
20 Ashburton Place
Boston, MA 02108
(617) 742-7950

ROBERT H. CHANIN
(Counsel of Record)
JOHN M. WEST
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, DC 20036
(202) 833-9340

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

82 pp

QUESTIONS PRESENTED

1. Whether small unions—with simple and easily understandable financial records—can meet their burden of providing adequate disclosure of the basis for the agency fee that they seek to collect from nonmembers without conducting an independent audit of those records, at a cost many times that of the agency fees at stake.

2. Whether complete forfeiture of the agency fee is an appropriate remedy for a union's failure to provide feepayers with a constitutionally adequate notice of the basis for the fee.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	2
B. Proceedings Below	6
C. The Federal Question	9
REASONS FOR GRANTING THE WRIT	10
I. THIS COURT SHOULD REVIEW THE DECISION BELOW IN ORDER TO CORRECT THE MISREADING OF *HUDSON* THAT RENDERS ILLUSORY THE RIGHT OF SMALL UNIONS TO COLLECT AGENCY FEES BY IMPOSING TRANSACTION COSTS FAR IN EXCESS OF THE AMOUNT OF THE FEES AT STAKE	10
II. THIS COURT SHOULD RESOLVE THE CONFLICT IN AUTHORITY CREATED BY THE DECISION BELOW CONCERNING THE APPROPRIATE REMEDY FOR A UNION'S FAILURE TO PROVIDE A CONSTITUTIONALLY ADEQUATE NOTICE OF THE BASIS FOR ITS AGENCY FEE	21
CONCLUSION	24

TABLE OF CONTENTS—Continued

APPENDICES: Page

APPENDIX A

Opinion of the Supreme Judicial Court of Massachussetts (July 15, 1999) 1a

APPENDIX B

Decision and Order of the Massachusetts Labor Relations Commission (October 29, 1997) 14a

APPENDIX C

Massachusetts General Laws, Chapter 150E, Section 12 ..... 51a

TABLE OF AUTHORITIES

CASES Page

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) ..... *passim*
Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987) 14, 15
Belhumeur v. Labor Relations Comm'n, 411 Mass. 142, 580 N.E.2d 746 (1991), *cert. denied*, 503 U.S. 1004 (1992) 8, 9, 17, 20
Browne v. Wisconsin Employment Relations Comm'n, 169 Wis. 2d 79, 485 N.W.2d 376 (1992) 16, 22
Carey v. Piphus, 435 U.S. 247 (1978) 22
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) ..... *passim*
Dashiell v. Montgomery County, 925 F.2d 750 (4th Cir. 1991) 14
Finerty v. NLRB, 113 F.3d 1288 (D.C. Cir.), *cert. denied*, 118 S. Ct. 558 (1997) 15
Gilpin v. AFSCME, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989) 19, 20, 22
Harrison v. Massachusetts Soc'y of Professors/ Faculty Staff Union, 405 Mass. 56, 537 N.E.2d 1237 (1989) 9
Hohe v. Casey, 956 F.2d 399 (3d Cir. 1992) 14, 16, 22, 23
International Ass'n of Machinists v. NLRB, 133 F.3d 1012 (7th Cir.), *cert. denied*, 119 S. Ct. 47 (1998) 17
International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) 12
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 12
Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990) 16, 22, 23
Malden Educ. Ass'n, 15 Mass. Labor Cases 1429 (Feb. 2, 1989) 4, 7, 9, 19
Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986) 22
Prescott v. County of El Dorado, 177 F.3d 1102 (9th Cir. 1999) 14, 16, 22

TABLE OF AUTHORITIES—Continued

	Page
Price v. UAW, 927 F.2d 88 (2d Cir.), *cert. denied*, 502 U.S. 905 (1991)	15
School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1980)	6, 9
Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987)	14
Wareham Education Association v. Labor Relations Commission, 439 Mass. 81, 713 N.E.2d 363 (1999)	1
Weaver v. University of Cincinnati, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993)	22, 23
CONSTITUTIONAL AND STATUTORY PROVISIONS	
U.S. Const. amend. I	2
28 U.S.C. § 1257(a)	2
Mass. Gen. L. ch. 150E, § 12	*passim*
Mass. Gen. L. ch. 211A, § 10(A)	7

IN THE

Supreme Court of the United States

No. 99-

WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
and FAIRHAVEN EDUCATORS' ASSOCIATION,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION,
DAVID DUPUIS, ELEANOR DUPUIS, BETSY ANN WOOD,
CHARLES CIPOLLINI, and PETER ANTHONY,
Respondents

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts in *Wareham Education Association v. Labor Relations Commission*, 430 Mass. 81, 713 N.E.2d 363 (1999).

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at 430 Mass. 81 and at 713 N.E.2d 363, and is reproduced in the Appendix to this Petition ("App.") at 1a. The decision and order of the Massachusetts Labor Relations Commission is reported at 24 Mass. Labor Cases 23, and is reproduced in the Appendix at 14a.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on July 15, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . ."

The text of Mass. Gen. L. ch. 150E, § 12, is reproduced in the Appendix at 51a.

STATEMENT OF THE CASE

A. *Factual Background*

Petitioners Wareham Education Association ("WEA"), Bridgewater Education Association ("BEA"), and Fairhaven Educators' Association ("FEA") (collectively "Associations") are local unions that, pursuant to Massachusetts law, were recognized, respectively, as the exclusive collective bargaining representatives for the teachers employed by the School Committees of Wareham, Bridgewater, and Fairhaven, Massachusetts during the 1988-89 school year—which is the school year that is at issue in this lawsuit.[1] Although the five individual respondents were members of the bargaining units in question—and thus were represented by the Associations—they elected not to become Association members.

Massachusetts, like a number of other states, has provided by law that public-sector collective bargaining agreements may require members of the bargaining unit who decline to join the recognized union to pay an agency

---

1 With respect to respondent Betsy Ann Wood and WEA only, the 1987-88 school year also is at issue. As this detail has no bearing on the question presented here, we disregard it in this Petition.

fee to help defray the costs incurred by the union in providing representational services that benefit union members and nonmembers alike. *See* Mass. Gen. L. ch. 150E, § 12. The collective bargaining agreements in effect at all relevant times between the Associations and their respective school committees contained such provisions, and, accordingly, each of the individual respondents was required to pay an agency fee to his or her Association—a portion of which was transmitted by the Association to its state and national affiliates, the Massachusetts Teachers Association ("MTA") and the National Education Association ("NEA").[2]

As is the usual practice of unions, the agency fees requested by the Associations for the 1988-89 school year were based on their expenditures for the immediately preceding school year. Feepayers were informed of the procedure through which they could obtain a reduction in the amount of the fee, if they objected to paying the portion that supported Association activities that were not germane to collective bargaining. In order to comply with their burden under *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), of ensuring that "potential objectors be given sufficient information to gauge the propriety of the union's fee," *id.* at 306, the Associations also provided feepayers with certain financial information. With respect to the portion of the agency fee that was to be passed on to their state and national affiliates, the Associations provided feepayers with a book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information." This book contained information relative to MTA's and NEA's calculation of their portions of the agency fee, including, *inter alia*, audited financial statements of those organizations for the 1987-88 school year.

---

[2] MTA and NEA are not parties to this lawsuit.

With respect to their own portion of the agency fee, the Associations did not provide audits. Several months earlier, respondent Massachusetts Labor Relations Commission ("Commission") had issued an opinion in which it stated that, as a general matter, "*Hudson* requires a public employee union to provide for the fiscal year preceding the period for which the fee is demanded a copy of an independent auditor's financial statement of revenue and expenses . . . ." *Malden Educ. Ass'n,* 15 Mass. Labor Cases 1429, 1435 (Feb. 2, 1989). In a footnote, however, the Commission elaborated as follows:

> We recognize that small unions may find the expense of an audit very burdensome. Therefore, we conclude that, in lieu of an auditor's report, a small local can satisfy that informational requirement of Section 12 by supplying to fee payers at the time of demand a sworn affidavit of a responsible union officer with personal knowledge of the accuracy of the figures upon which the union's calculation of the fee are based. An affidavit attesting to the accuracy of figures on which the union's calculation of the fee are based must be accompanied with the written assurance that the fee payer, upon request, either can obtain from the union a list of all expenditures or, at the fee payer's option, can examine the union's financial receipts and record of expenses (i.e. receipts, check stubs, etc.) at a mutually convenient time.

Id. at 1435 n.10.

All three Associations clearly were "small unions" within the meaning of the above footnote. Their 1987-88 revenues ranged from $9,400 (WEA) to $17,500 (BEA) and $29,000 (FEA).[3] WEA represented a bargaining unit of 204 employees, one of whom (respondent Wood) was a nonmember feepayer. The agency fee assessed by WEA for the school year 1988-89 was $30. There were

---

[3] These revenue figures exclude dues and fee collected by the Associations that were passed on to MTA and NEA.

116 employees in BEA's bargaining unit, including two nonmembers (respondents David and Eleanor Dupuis), who were each charged an agency fee of $30. The FEA bargaining unit included 185 employees, of whom seven (including respondents Cipollini and Anthony) were nonmembers. FEA's 1988-89 agency fee amounted to $45.

The financial records of the Associations were not complex. For example, the Commission found WEA's financial records to consist of the following:

> Ledger pages
> Approximately 40 cancelled checks, containing a one or two word description of the expenditure
> Approximately 48 check stubs
> Approximately 21 receipts or invoices
> Monthly bank statements
> Monthly treasurer's reports
> An accountant's summary of operations.

App. 23a-24a.[4] The cost to the Associations of obtaining an audit of their financial records can be estimated from the experience of several somewhat larger local associations affiliated with MTA which obtained audits in 1989. The cost of those audits ranged from $2,230.36 to $4,105.00, and the Commission found that "the cost of an audit would be the same for a union with a small income as it would be for a union with a larger income." App. 32a.

Accordingly, the Associations chose to proceed in the manner authorized by the Commission in the above-quoted footnote in *Malden Education Ass'n.* Specifically, each of the Associations provided feepayers with a six-page "Local Association Agency Fee Explanation 1988-89," which described how the Association had calculated its agency fee, explained the criteria for categorizing various types

---

[4] The Commission's descriptions of the financial records of BEA and FEA—which are similar—can be found at App. 20a-21a and 27a, respectively.

of expenditures as chargeable or nonchargeable, set forth the Association's prior-year expenditures in some 14 categories, and indicated the amounts in each category that were chargeable and nonchargeable to objecting feepayers. The Explanation concluded with a declaration signed by the Association treasurer stating, *inter alia*:

> In signing this form, I certify that the information contained herein is a true and accurate reflection of the Association's actual expenditures during the 1987-88 year to the best of my knowledge and ability. Signed under the pains and penalties of perjury.

An accompanying letter informed the feepayer that

> [i]n accordance with a decision of the Labor Relations Commission, you are entitled, upon request, either to obtain from the Local a list of all expenditures or to examine the Local's financial receipts and record of expenses at a time convenient to you and to the Local.

B. *Proceedings Below*

This litigation began in 1989 and 1990, when the five individual respondents filed charges with the Commission, alleging that they had been provided with insufficient information as to the basis of the agency fees assessed by the Associations for the 1988-89 school year, and that those fees were in excess of the amount permitted by law.[5] Following an investigation, the Commission issued substantively identical two-count complaints against each of the Associations, charging that they had violated Mass. Gen. L. ch. 150E, § 12—the state law provision authorizing agency fees—by demanding agency fees for that year without providing the feepayers with audits of their prior-year expenditures (Count I), and in excess of the amount

---

[5] The Commission is the primary forum for litigation of public-sector agency fee disputes in Massachusetts. *See School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 75-76, 431 N.E.2d 180, 184-85 (1982).

permitted by law (Count II). The Commission subsequently ordered the complaints bifurcated, and addressed Count II in separate proceedings that are not relevant to this Petition.

With regard to Count I, the Commission conducted multiple hearings and received several rounds of briefs from the parties. After seven years of proceedings, the Commission issued a Decision and Order on October 29, 1997, App. 14a, in which it sustained the complaints. Expressly disavowing its previous conclusion in *Malden Educ. Ass'n, supra,* that "small unions" could satisfy *Hudson*'s disclosure requirement without providing an audit to feepayers, App. 38a-39a; *see supra* p. 4, the Commission held that the Associations' failure to provide audits was in violation of Section 12. After reviewing the caselaw, the Commission now determined that "courts have held that verification by an independent auditor is a binding, constitutional requirement notwithstanding the potentially onerous financial implications." App. 39a. According to the Commission, these decisions reflected "the courts' reluctance to balance the competing interests of the unions and fee payors." App. 40a. Accordingly, the Commission held that "Section 12 of the Law requires unions, regardless of size, to provide an audit from an independent auditor along with their service fee demands," App. 42a, characterizing the contrary conclusion in *Malden Educ. Ass'n* as "dicta" which it "decline[d] to follow." App. 42a n.48. In its remedial order, the Commission ordered WEA, BEA, and FEA, *inter alia,* to dissolve the escrow accounts in which the individual respondents' 1988-89 agency fees had been placed, and to release those fees in their entirety to the respondents. App. 44a.

The Massachusetts Supreme Judicial Court granted petitioners' application for direct review, pursuant to Mass. Gen. L. ch. 211A, § 10(A), and on July 15, 1999, is-

sued an opinion affirming the Commission's decision in all respects. App. 1a.[6] The court recognized that the information a union provides to feepayers concerning the basis for its agency fee "is not intended to be dispositive of any dispute," but rather "is designed only to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined." App. 11a (quoting *Belhumeur v. Labor Relations Comm'n*, 411 Mass. 142, 146, 580 N.E.2d 746, 748 (1991), *cert. denied*, 503 U.S. 1004 (1992)). It further acknowledged that, for WEA, BEA, and FEA, "the cost of the audits would likely eclipse the agency fees available to the unions . . . ." App. 8a. Nonetheless, the court construed this Court's decision in *Hudson* as having established the invariable "express requirement that a union must accompany any demand for agency fees with an independently audited verification of its major expenses." App. 12a. In response to the Associations' contention that the requirement of an audit would render it impractical for them to collect agency fees, the court observed that, although Massachusets law "permits the collection of agency fees [by unions], it by no means requires them to do so." App. 9a.

The lower court also upheld the Commission's remedial order requiring the Associations to return the feepayers' agency fees in their entirety. It noted the holdings of a number of courts rejecting such a remedy for a notice violation as creating a "windfall" for the feepayers that would "deprive the unions of funds to which they are unquestionably entitled," App. 12a, but found those cases distinguishable. In this case, the court stated, the Associations were "free to renew their demands for any fees to which they

---

[6] The individual respondents—charging parties in the Commission proceedings—were permitted to intervene as appellees.

may be entitled once they comply with the requirements of [*Hudson*]." App. 13a.

C. *The Federal Question*

Both the Commission and the Massachusetts Supreme Judicial Court consistently have "construed and applied [Mass. Gen. L. ch. 150E, § 12] in a manner that avoids infringing on constitutional rights." *Malden Educ. Ass'n*, 15 Mass. Labor Cases at 1431 (citing *School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 79-86, 431 N.E.2d 180, 186-90 (1982)). Accordingly, although in this case both tribunals held that the Associations' failure to provide feepayers with audits was in violation of Section 12, they based their decisions exclusively on federal constitutional law.

Observing that "a union demanding a service fee from non-members must satisfy constitutional and statutory requirements," App. 38a, the Commission articulated its inquiry in this case as interpreting the requirements of "Section 12, as limited by the First Amendment to the United States Constitution." App. 37a. The Commission rested its analysis on *Hudson*, *supra*, and looked almost exclusively to federal cases for guidance in interpreting *Hudson*'s requirements. *See* App. 37a-43a. Similarly, the court below based its holding on an exegesis of *Hudson*, and—like the Commission—relied almost entirely on federal law in conducting its analysis. *See* App. 8a-12a.[7] Neither tribunal made any attempt to support its decision on the basis of anything specific to Section 12 or any other provisions of Massachusetts law.

---

[7] The court did cite two of its earlier decisions as being "in accord" with the conclusion it reached on the basis of the federal cases, but in both cases the cited passages from those decisions merely interpreted the requirements of *Hudson*. *See* App. 11a (citing *Harrison v. Massachusetts Soc'y of Professors/Faculty Staff Union*, 405 Mass. 56, 64 n.8, 537 N.E.2d 1237 (1989); *Belhumeur*, 411 Mass. at 145, 580 N.E.2d at 747-48).

Similarly with regard to the question of remedy—which became an issue in this lawsuit only on appeal, in the wake of the Commission's remedial order—the court discussed only federal cases in deciding to affirm the Commission's order. *See* App. 12a-13a.[8]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE DECISION BELOW IN ORDER TO CORRECT THE MISREADING OF *HUDSON* THAT RENDERS ILLUSORY THE RIGHT OF SMALL UNIONS TO COLLECT AGENCY FEES BY IMPOSING TRANSACTION COSTS FAR IN EXCESS OF THE AMOUNT OF THE FEES AT STAKE

The challenged holding of the Massachusetts Supreme Judicial Court—*i.e.*, that a union cannot constitutionally collect an agency fee from nonmembers whom it represents in collective bargaining without providing an audit, regardless of the local union's size, the complexity of its financial records, and the cost of the audit in relation to the amount of the fees at stake—is exemplary of an unfortunate tendency among lower courts to read a brief line of footnote dicta from *Hudson* in a way that undermines the fundamental objective this Court consistently has pursued with respect to agency fees. Unless corrected, the decision below threatens to render illusory the right of small unions to require nonmembers to help defray the cost of representational services that benefit union members and nonmembers alike.

A. The constitutionality of agency fees in the public sector has been well established for over twenty years. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), this Court recognized the agency fee's impact on the First Amendment interests of employees who did not wish

---

[8] The Commission's order itself provided no reasoning in support of the remedies it imposed. *See* App. 44a.

to support the union that represeented them, but it nonetheless sustained the constitutionality of such fees because of "the important contribution of the union shop to the system of labor relations established by [the legislature]." *Id.* at 222.

That "system of labor relations" rests on the core principle—adopted by Congress in the private sector, and by Massachusetts and many other states in the public sector—of exclusive representation of all members of a bargaining unit by the union that commands the support of a majority of its members. The system of exclusive representation, this Court has explained, has served the United States well in promoting labor peace:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Id. at 220-21.

But, as this Court further explained, "[t]he designation of a union as exclusive representative carries with it great responsibilities" in negotiating and administering collective bargaining agreements and processing grievances, which "often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required." *Id.* at 221. And, "in carrying out these duties, the union is obliged 'fairly and equitably to represent all employees . . . , union and nonunion,' within the relevant unit." *Id.* (quoting *International Ass'n of*

Machinists v. Street, 367 U.S. 740, 761 (1961)). Given these responsibilities and obligations,

> [a] union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders"—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Abood, 431 U.S. at 221-22.

While recognizing "the government's vital policy interest in labor peace and avoiding 'free riders,' " *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), as a basis for allowing agency fees, this Court also has been mindful of the First Amendment interests at stake. And, to protect those interests, it has imposed limitations on the collection and use of agency fees. Thus, a union may not charge nonmembers—over their objection—for expenditures not germane to the union's collective-bargaining activities, *see id.*, and the union must utilize certain collection procedures designed to minimize the infringement on the nonmembers' First Amendment interests. *See Hudson, supra*. In short, the law of agency fee, as it has been shaped by this Court, involves a balancing of vital interests on both sides of the equation. In an oft-repeated phrase that could stand as the guiding principle for this Court's agency fee jurisprudence, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237.

B. That objective informed this Court's decision in *Hudson, see* 475 U.S. at 302, which set forth the procedures that a union must follow in order to collect an

agency fee. In holding that the procedures followed by the Chicago Teachers Union in that case were constitutionally inadequate, this Court articulated three fundamental procedural requirements for agency fee collection. First, the union must avoid the risk that the funds of objecting nonmembers will be used, even temporarily, for purposes unrelated to collective bargaining; second, it must provide nonmembers with adequate information about the basis for the agency fee; and third, it must afford nonmembers who wish to challenge the amount of the fee the opportunity to obtain a reasonably prompt decision by an impartial decisionmaker. *Id.* at 304-09.

With regard to the second of these procedural requirements—which is the one that is at issue here—this Court noted that "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee." *Id.* at 306. The *Hudson* Court found inadequate the union's disclosure in the case before it, because the union had described only those of its expenditures that went for admittedly *nonchargeable* purposes: "An acknowledgement that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%." *Id.* at 307. In an accompanying footnote, this Court noted that "absolute precision" in this regard was not required, and then made the following comment:

> The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.

Id. at 307 n.18.

While the reference to an audit in this footnote clearly was dicta—it was not necessary to this Court's holding

that a disclosure identifying only the union's nonchargeable expenditures is inadequate—the principle is nonetheless now well established that, *as a general matter*, an independent audit of the expenditures on which the agency fee is based must be provided to feepayers. *See, e.g., Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir. 1987); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 338-40 (2d Cir. 1987); *Dashiell v. Montgomery County*, 925 F.2d 750, 754-57 (4th Cir. 1991); *Hohe v. Casey*, 956 F.2d 399, 415 (3d Cir. 1992); *Prescott v. County of El Dorado*, 177 F.3d 1102, 1106-09 (9th Cir. 1999). Accordingly, the Associations' state and national affiliates—MTA and NEA—and other large unions typically include audits of their expenditures as part of the packet of financial data that they provide to feepayers. *See, e.g.*, App. 4a (audits of MTA and NEA were part of book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information" provided to nonmembers).

The question presented by this Petition is whether this audit requirement *invariably* applies to *all* unions, regardless of the size of the union, the complexity of its financial records, the amount of the fees at stake in relation to the cost of the audit, and the potential availability of alternative methods of providing feepayers with "sufficient information to gauge the propriety of the union's fee," *Hudson*, 475 U.S. at 306—and regardless of whether the requirement of paying for an audit would effectively negate "the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237; *Hudson*, 475 U.S. at 302.

C. The court below answered this question "yes," notwithstanding its recognition that "the cost of the audits would likely eclipse the agency fees available to the unions." The court suggested, in effect, that a small

union's recourse when confronted with audit costs vastly disproportionate to the amount of the agency fees at stake is simply to forgo collection of such fees. *See* App. 9a ("It should be noted however that, although G.L. c. 150E, § 12, permits the collection of agency fees [by unions], it by no means requires them to do so.").

Other courts have adopted the same absolutist position. For example, the Second Circuit (without having to decide the issue presented here) rejected the notion that the "[e]xcessive cost" of an audit was of any relevance, and admonished the district court that it "should not have approached this question with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests," *Andrews*, 829 F.2d at 339—even though this Court repeatedly has described the "objective" of its agency fee jurisprudence as an attempt to accommodate just such competing interests. *Abood*, 431 U.S. at 237; *Hudson*, 475 U.S. at 302.

On the other hand, a recent decision of the Ninth Circuit, while repeating some of the *Andrews* language, pointed to the possibility that smaller unions might be able to meet their *Hudson* obligations without an audit. In holding that a union's "local presumption" provided insufficient disclosure to nonmembers,[9] the court stated:

---

[9] The "local presumption" is one approach some small local unions have adopted in an attempt to preserve their ability to collect an agency fee after *Hudson*. Under this approach, nonmembers are provided with full documentation (including audits) of the local union's parent affiliates, but for purposes of the notice to fee-payers the assumption is made that the chargeable percentage of the local's expenditures is at least as high as that of the affiliates—which percentage is then used as the basis for calculating the local's fee as well. While some courts have upheld a form of local presumption, *e.g.*, *Finerty v. NLRB*, 113 F.3d 1288, 1292 (D.C. Cir.), *cert. denied*, 118 S. Ct. 558 (1997); *Price v. UAW*, 927 F.2d 88, 93-94 (2d Cir.), *cert. denied*, 502 U.S. 905 (1991); *Browne v. Wiscon-*

"We do not decide that each little unit in the [parent affiliate's] firmament must necessarily be subjected to a separate verified audit of its expenditures . . . ." *Prescott*, 177 F.3d at 1108. What was required, said the court, was "some auditor verifiable methodology which is more than a presumption." *Id.* That formulation would appear to sanction the financial disclosure provided by the Associations in this case—which did not involve any "presumption," but provided feepayers with "auditor verifiable" data about the Associations' expenditures, including "an exhaustive and detailed list of all [their] expenditures." *Hudson*, 475 U.S. at 307 n.18.[10]

The *Prescott* court added that the methodology used to provide the requisite notice to feepayers "must be utilized with an eye on the purpose of the notice in the first place, that is to allow [feepayers] a reasonable opportunity to gauge whether the money taken from them is being spent on chargeable expenses." 177 F.3d at 1108-09. While *Prescott* appears to acknowledge that this "reasonable opportunity" can, under some circumstances, be provided via something less than a formal audit, the court below insisted that nothing less would do—even if it imposed on small unions transaction costs wholly out of proportion to the amount of the agency fees at stake, thus effectively nullifying such unions' "ability to require every employee

---

son Employment Relations Comm'n, 169 Wis. 2d 79, 121-23, 485 N.W.2d 376, 393-94 (1992) (upholding modified presumption based on audit of random sample of locals), others have found it unconstitutional, particularly in the absence of any empirical data supporting the presumption. *E.g.*, *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430-32 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990); *Hohe*, 956 F.2d at 409-11; *Prescott*, 177 F.3d at 1108.

10 The court below apparently misread *Prescott*, quoting in support of its position a portion of that decision that did not address the situation of small local unions, but rather considered whether—for the parent affiliate—an accountant's "review" could take the place of a full audit. *See* App. 10a (quoting 177 F.3d at 1107-08).

to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237.[11]

The issue presented by this Petition is important not only for the three Associations directly involved, but for numerous other unions as well. In Massachusetts, for example, the vast majority of local associations affiliated with MTA are small: of MTA's 297 local affiliates in 1988-89, only 30 had annual income in excess of $25,000. App. 37a. The holding of the court below effectively renders it impossible for these small unions—and their counterparts in Massachusetts and other states—to require nonmembers to contribute their fair share to the support of representational activities that provide an indivisible service to all members of their bargaining units—and thus threatens the very objective underlying this Court's agency fee jurisprudence.

D. Although a full explication of petitioners' views as to the type of disclosure that is necessary to provide fee-payers with "sufficient information to gauge the propriety of the union's fee," *Hudson*, 475 U.S. 306, must await briefing on the merits, it may be helpful to explain the dilemma created for the Associations and other small unions by the imposition of a wholly inflexible audit requirement.

---

[11] Contrary to the view of the court below that *Hudson*'s footnote reference to "verification by an independent auditor" was intended to establish a requirement that is unvarying and inflexible, the courts are far from unanimous in requiring such rigidity. The language of footnote 18 has been described as "uncertain," *Belhumeur*, 411 Mass. at 145, 580 N.E.2d at 747; and apart from those cases that have approved a form of "local presumption," *see supra* note 9, the Seventh Circuit has recently recognized the reality that "CPAs are costly" in upholding a procedure under which local unions had their books "audited" by lay employees of their parent union. *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012, 1016-18 (7th Cir.), *cert. denied*, 119 S. Ct. 47 (1998).

The three Associations in this lawsuit all have small memberships, which during the year in question ranged from 114 to 203.[12] They had revenues that year of between $9,400 and $29,000. WEA's bargaining unit included one nonmember, from whom it stood to collect an agency fee of $30. BEA represented two nonmembers, whom it charged a $30 fee, for total potential agency fee income of $60. FEA's bargaining unit included seven nonmembers, who were assessed agency fees of $45, for a total of $315.

The record also shows that the cost to each of the Associations to conduct an audit of its financial records would have been in the range of $2,230 to $4,105. Even using the lowest of these figures, the cost of the audit would—depending on the Association—have exceeded the total amount of agency fees the Association could have collected by multiples of 7 (FEA), 37 (BEA), or 74 (WEA). If the three Associations were required to conduct audits as a prerequisite for collecting agency fees, they would in all likelihood simply be forced to forgo entirely their statutory and contractual rights to obtain a financial contribution from the nonmembers that they are legally obligated to represent. It is difficult to imagine, for example, how WEA—consistent with the fiduciary duty it owes to its members—could justify an expenditure in excess of $2,000 in order to collect a fee totaling $30.

Imposing on small unions—such as WEA, BEA, and FEA—unaffordable transaction costs wholly disproprotionate to the amount of the agency fees at stake would be particularly unfortunate in view of the potential availability to such unions of alternative means of providing

---

12 By contrast, the union involved in *Hudson* had over 26,000 members, *see* 475 U.S. at 294—some 130 times the size of the largest of the three Associations involved in this lawsuit.

feepayers with "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306. As noted above, the Commission had concluded—in an earlier decision that it disavowed in this case—that, in lieu of an audit, a small union could meet its burden under *Hudson* by providing to feepayers an affidavit of a union officer attesting to the accuracy of the figures upon which the union's fee was based, together with "written assurance that the feepayer, upon request, either can obtain from the union a list of all expenditures or, at the feepayer's option, can examine the union's financial receipts and record of expenses (i.e. receipts, check stubs, etc.) at a mutually convenient time." *Malden Educ. Ass'n*, 15 Mass. Labor Cases at 1435. That is the procedure the Associations used here. *See supra* pp. 5-6.

Where, as in this case, the union's financial records consist of a limited number of relatively simple documents easily understandable by feepayers, *see supra* p. 5, and where the union is of such size that it would not normally find it necessary to obtain an audit for any other operational purpose, the procedure outlined by the Commission in *Malden Educ. Ass'n* would appear to be particularly well adapted to providing feepayers with an understanding of the basis for the union's agency fee without imposing disproportionate transaction costs that would render collection of any fee impossible. Indeed, the typical feepayer, who is likely unfamiliar with the jargon of auditors, may well derive a *better* understanding of the union's expenditures from that kind of financial disclosure than he or she would from a formal auditor's report. *Cf. Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.) (suggesting that an agency fee notice "as long and complicated as an SEC prospectus" does not necessarily serve the interests of feepayers), *cert. denied*, 493 U.S. 917 (1989).

The financial disclosure provided by the Associations here would, moreover, appear to be fully consistent with the spirit of *Hudson*'s footnote 18—in which this Court suggested the requirement of an audited statement of the union's "major categories of expenses" only after noting that "[t]he Union need *not* provide nonmembers with an *exhaustive and detailed list of all its expenditures.*" 475 U.S. at 307 n.18 (emphasis added). Here, the Associations *have* provided the "exhaustive and detailed list of all [their] expenditures" that the *Hudson* footnote deemed not to be required.

In assessing whether, under circumstances where the cost of an audit is prohibitive, some other method of giving feepayers "sufficient information to gauge the propriety of the union's fee," *id.* at 306, might be adequate, it also is helpful to keep in mind the *purpose* of the audit requirement. As the court below correctly observed:

> [T]he information that the union must provide under the *Hudson* opinion is not intended to be dispositive of any dispute. That information is designed only to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined.

App. 11a (quoting *Belhumeur*, 411 Mass. at 146, 580 N.E.2d at 748). In deciding whether to challenge the amount of the agency fee, the feepayer is contemplating an act that—in contrast to many other acts undertaken in reliance on audited financial statements—is virtually cost-free and risk-free: if in doubt, the feepayer need only file his or her challenge, which costs nothing but a 33-cent stamp. *See Gilpin*, 875 F.2d at 1316 ("[M]ounting a challenge is for all practical intents and purposes free. . . .").

To insist, therefore, that a union's burden of documenting the basis for its agency fee can never be satisfied through anything less than a formal audit—even where that requirement would make collection of any fee prohibitively expensive—appears inconsistent with this Court's repeated admonition that the objective "must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*" *Abood*, 431 U.S. at 237; *Hudson*, 475 U.S. at 302 (emphasis added).

II. THIS COURT SHOULD RESOLVE THE CONFLICT IN AUTHORITY CREATED BY THE DECISION BELOW CONCERNING THE APPROPRIATE REMEDY FOR A UNION'S FAILURE TO PROVIDE A CONSTITUTIONALLY ADEQUATE NOTICE OF THE BASIS FOR ITS AGENCY FEE

The remedial issue presented by the decision below also is worthy of this Court's attention. Upon finding the Associations' notices to feepayers to be constitutionally inadequate because of the absence of audits, the Massachusetts Supreme Judicial Court turned to the question of remedy. The court affirmed the Commission's order requiring the Associations to return to the individual respondents the full amount of the agency fees collected from them during the year in question—which to that point had been held in an escrow account. *See* App. 12a-13a; App. 44a (Commission order).

The holding of the court below that forfeiture of the entire agency fee constitutes an appropriate remedy for a failure to provide a constitutionally adequate notice of the basis for the agency fee is contrary to the holdings of at least four federal courts of appeals and one state supreme court that have considered the issue. *See Gilpin*

v. AFSCME, 875 F.2d 1310, 1313-16 (7th Cir.), *cert. denied,* 493 U.S. 917 (1989); *Lowary v. Lexington Local Bd. of Educ.,* 903 F.2d 422, 432-33 (6th Cir.), *cert. denied,* 498 U.S. 958 (1990); *Weaver v. University of Cincinnati,* 970 F.2d 1523, 1533-34 (6th Cir. 1992), *cert. denied,* 507 U.S. 917 (1993); *Hohe v. Casey,* 956 F.2d 399, 415-16 (3d Cir. 1992); *Prescott v. County of El Dorado,* 177 F.3d 1102, 1109-10 (9th Cir. 1999); *Browne v. Wisconsin Employment Relations Comm'n,* 169 Wis. 2d 79, 130-34, 485 N.W.2d 376, 397-98 (1992).

These latter holdings are bottomed on the proposition that full restitution of the agency fees—much or all of which is properly chargeable to feepayers—would amount to a punitive remedy of the kind that, absent willful or malicious constitutional violations, this Court has rejected as an inappropriate remedy in civil rights cases. *Carey v. Piphus,* 435 U.S. 247 (1978); *Memphis Community Sch. Dist. v. Stachura,* 477 U.S. 299 (1986). As the Seventh and Ninth Circuits have observed:

> The union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things . . . . The plaintiffs do not propose to give back the benefits that the union's efforts bestowed on them. These benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law . . . .

Prescott, 177 F.3d at 1109 (quoting *Gilpin,* 875 F.2d at 1316). Accordingly, these courts have found the proper remedies for failure to provide adequate notice (including the lack of an audit) to include injunctions against further collection of agency fees until such notice is pro-

vided, *e.g.*, *Weaver*, 970 F.2d at 1534, and nominal damages, *e.g.*, *Hohe*, 956 F.2d at 415-16.

The court below purported to distinguish several of these cases by asserting, without citation, that there the issue had been whether the unions could *ever* recover the agency fees in question, App. 13a, while in the case before it the court read the Commission's order as allowing the Associations to renew their demands for the 1988-89 agency fees "once they comply with the requirements of [*Hudson*]," App. 13a—presumably by furnishing audits for 1987-88. But this is a distinction without a meaningful difference. As a practical matter, it is questionable whether audits of the Associations' expenditures during the 1987-88 school year could be prepared at this point. But even if the Associations were able to prepare audits so long after the events in question, once refunds have been made to the individual respondents from the escrow accounts, it is to say the least doubtful whether those funds could be recouped.[13]

In sum, the remedy ordered by the Commission and affirmed by the Massachusetts Supreme Judicial Court "depriv[es] the Union of access to some . . . funds that it is unquestionably entitled to retain." *Lowary*, 903 F.2d at 433 (quoting *Hudson*, 475 U.S. at 310). Despite the attempt of the lower court to distinguish the cases cited above, the fact is that the courts in those cases have concluded that this is not a proper remedy for a union's failure to comply with *Hudson*'s disclosure requirement.

---

[13] The record does not disclose whether the individual respondents remain employed in the same school districts and, if so, whether those districts' collective bargaining agreements still contain agency fee provisions. Unless both of these conditions are met, it is difficult to see what means would be available to the Associations at this point to collect their 1988-89 agency fees.

This Court should grant certiorari in order to resolve this conflict.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ANN CLARKE
Massachusetts Teachers Ass'n
20 Ashburton Place
Boston, MA 02108
(617) 742-7950

ROBERT H. CHANIN
(Counsel of Record)
JOHN M. WEST
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, DC 20036
(202) 833-9340

Attorneys for Petitioners

APPENDIX A

SUPREME JUDICIAL COURT OF MASSACHUSETTS
SUFFOLK

WAREHAM EDUCATION ASSOCIATION & OTHERS [1]

v.

LABOR RELATIONS COMMISSION;
DAVID DUPUIS & OTHERS,[2] INTERVENERS.

Argued May 3, 1999

Decided July 15, 1999

Present: WILKINS, C.J., ABRAMS, LYNCH, GREANEY, FRIED, MARSHALL, & IRELAND, JJ.

LYNCH, J.

The Bridgewater Education Association (BEA), the Wareham Education Association (WEA) and the Fairhaven Education Association (FEA) (collectively, unions) appeal from the decision of the defendant, Labor Relations Commission (commission), requiring them to return certain agency shop fees [3] to nonunion members and precluding them from claiming such fees absent audited

---

[1] Bridgewater Education Association and Fairhaven Education Association.

[2] Eleanor Dupuis, Betsy Ann Wood, Charles Cipollini, and Peter Anthony. A motion to intervene was filed and allowed in the Appeals Court.

[3] Under G.L. c. 150E, § 12, if a public employee union represents nonunion members for collective bargaining purposes, the union may demand a fee for its agency representation.

financial statements. We granted the plaintiff unions' application for direct appellate review, and we now affirm the commission's ruling.

The interveners, David Dupuis; Eleanor Dupuis; Betsy Ann Wood; Charles Cipollini; and Peter Anthony (collectively, teachers), all teach in school districts represented by the unions. None of the teachers is a member of the respective union representing teachers in the collective bargaining process. In 1989 and 1990, the teachers filed charges with the commission challenging the unions' 1988-1989 agency fee demands as to amount and procedural compliance.[4] On the basis of these complaints, the commission issued separate two-count complaints against each union alleging that each union violated G.L. c. 150E, § 12, by demanding an agency service fee without providing the teachers with an independent auditor's financial statement of its revenues and expenses for the relevant period and by demanding an excessive fee. The commission bifurcated these two counts and, following a hearing, concluded that the unions' failure to provide audited financial statements was in violation of G.L. c. 150E, §§ 12[5] and 10(b)(1).[6] As a result of this con-

---

[4] Betsy Ann Wood also challenged the WEA service fee demands for the 1987-1988 school year.

[5] General Laws c. 150E, § 12, provides in relevant part:

"The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, of a service fee to the employee organization which in accordance with the provisions of this chapter, is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such employee is employed; provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring

clusion, the commission ordered the unions to dissolve the escrow fund in which the teachers' agency fees were being held, and return the withheld fees to the teachers.

---

its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting.

"Prior to the vote, the exclusive bargaining agent shall make reasonable efforts to notify all employees in the unit of the time and place of the meeting at which the ratification vote is to be held, or any other method which will be used to conduct the ratification vote. The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or received. No employee organization shall receive a service fee as provided herein unless it has established a procedure by which any employee so demanding may obtain a rebate of that part of said employee's service payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for:

"(1) contributions to political candidates or political committees formed for a candidate or political party;

"(2) publicizing of an organizational preference for a candidate for political office;

"(3) efforts to enact, defeat, repeal or amend legislation unrelated to the wages, hours, standards of productivity and performance, and other terms and conditions of employment, and the welfare or the working environment of employees represented by the exclusive bargaining agent or its affiliates;

"(4) contributions to charitable, religious or ideological causes not germane to its duties as the exclusive bargaining agent;

"(5) benefits which are not germane to the governance or duties as bargaining agent, of the exclusive bargaining agent or its affiliates and available only to the members of the employee organization."

[6] General Laws c. 150E, § 10(b)(1), provides: "It shall be a prohibited practice for an employee organization or its designated agent to . . . [i]nterfere, restrain, or coerce any employer or employee in the exercise of any right guaranteed under this chapter."

The material facts are not in dispute. The unions' agency fee demands for the years in question each included a letter stating that the fees were calculated using actual financial records of the particular local affiliate for the preceding school year. Each contained the following statement along with the respective treasurer's unnotarized signature: "In signing this form, I certify that the information contained herein is a true and accurate reflection of the [local union affiliate's] actual expenditures during the 1987-88 year to the best of my knowledge and ability. Signed under the pains and penalties of perjury." The demands also included an explanation of how the local affiliate calculated its share of the service fee, and a book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information." This book contained audits by a certified public accountant of the local affiliates' parent associations (the National Education Association and the Massachusetts Teachers Association). None of the demands included independently audited financial statements for the local affiliate requesting payment.

With regard to the years in question, the commission found the following facts: The FEA had an approximate income of $29,000 and represented 185 employees, of whom seven were nonmembers. The BEA had an approximate income of $17,900, and represented 116 employees, including two nonmembers. The WEA's approximate income for those years was $9,400, and it represented 205 employees, including one nonmember. The local portion of the fees sought from nonmembers did not exceed $45.

The commission further found:

> "There are three levels or kinds of service that an accountant or auditor can provide of an entity's

financial statements: a compilation, a review and an audit. The purpose of these services is to determine and disclose the level of reliance which can be placed on an entity's financial statements. Each level of service consists of three components: a report, a set of financial statements, and notes accompanying the financial statements. Although the financial statements and accompanying notes are generally the same for each level of service, the report differs significantly depending on whether the service performed is a review, a compilation or an audit.

"A compilation is the lowest level of service and offers no assurance that the numbers listed in the financial statements are fairly stated. In a compilation, an accountant receives financial information from the management of an entity, reviews the figures for clerical errors and records the figures in the form of financial statements. The accountant may also discuss the accounting policy with management and try to identify any issues that were not in conformity with generally accepted accounting principles and issues a report. The accountant is not required to make inquiries or perform other procedures to verify, corroborate or review information supplied by the entity.

"The review is the next level of service in which an accountant performs limited testing of the figures listed on the financial statements using analytical procedures and inquiries of management. The objective of a review is to provide a reasonable basis for an accountant to express limited assurance that there are no material modifications that should be made to the financial statements. A review requires no actual testing of documentation. Instead, the ac-

countant reviews the accounting books and journals and relies on verbal inquiries of management. Specifically, the accountant performs an analytical review of the listing of accounts at year end, as well as a comparative analysis from year to year to look for consistency or unusual changes. The accountant also compares actual results to the entity's budget. Depending on whether problems existed with the analysis, the accountant would look for schedules that were tied to the listing of accounts, i.e. at cash to see if a bank reconciliation was completed. Finally, the auditor generates the report, the financial statements, and the note disclosures. Because these procedures are used, the review is more reliable than a compilation.

"The audit is the highest level of service. The objective of the audit is to express an auditor's opinion on the extent to which the financial statements fairly present, in all material respects, the entity's financial position, results of operations and cash flows, in conformity with generally accepted accounting principles.

"An auditor employs the following procedure when performing an audit. First, the auditor reviews the entity's internal controls—its internal procedures and accounting system—to determine the level of risk and the auditor's level of reliance. Based on this information, the auditor determines which testing methodology to use, either the substantive approach or the compliance approach. In the substantive approach, the auditor places no reliance on internal controls and tests all the account balances in detail (over the materiality level) by physically viewing

the supporting documentation. For example, the auditor could review every check and invoice written on a particular account to ensure that the amounts matched and proper approval process was followed, using their judgment to determine how many accounts to review. The auditor could also review leases to determine whether payment matched the lease agreement. Conversely, in the compliance approach the auditor relies on internal controls and tests the accounting cycles, thereby reducing the amount of substantive testing that would be necessary.

"In addition, the auditor completes the confirmation process by sending confirmation requests to banks (for loans or cash), or others for accounts receivable and accounts payable. Finally, the auditor considers subsequent events, such as whether a loss of assets occurred after the fiscal period or whether litigation existed which would substantially change the financial picture.

"There are certain limitations inherent in the auditing process. For example, the American Institute of Certified Public Accountants (AICPA) Codification of Statements on Auditing Standards provides in part that:

" 'Because of the characteristics of irregularities, particularly those involving forgery and collusion, a properly designed and executed audit may not detect a material irregularity. For example, generally accepted auditing standards do not require that an auditor authenticate documents, nor is the auditor trained to do so. Also, audit procedures that are effective for detecting a misstatement that is unintentional may be ineffective for a misstatement that is intentional and is concealed through collusion between client personnel and third parties or among

management or employees or the client.'" (Footnotes omitted.)

Matter of Wareham Educ. Ass'n, Bridgewater Educ. Ass'n, Fairhaven Educ. Ass'n, 24 M.L.C. 23, 26-27 (1997). The commission noted that the cost of audits for local unions in Springfield, Chicopee, Newton, and Taunton ranged from $2,230.36 to $4,105. *Id.* at 27-28.

It is apparent from the commission's findings that, although there are inherent limitations, the audit provides significantly more verification and reliability than the other accounting options. It is also discernable that the cost of the audits would likely eclipse the agency fees available to the unions under G.L. c. 150E, § 12.

In *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 310, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the United States Supreme Court held that "the constitutional[7] requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reason-

---

[7] The Supreme Court has held that agency fees such as those authorized under G.L. c. 150E, § 12, implicate the First and Fourteenth Amendments to the United States Constitution. *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 301-302 & n. 9, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), citing *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). This is so because under the color of a State statute, nonmembers may be compelled against their wishes to associate with and perhaps to subsidize the union charged with representing nonmembers' interests in collective bargaining as a condition of public employment. *Chicago Teachers Union, Local No. 1 v. Hudson, supra.* Nevertheless, the Court has approved the constitutionality of such arrangements in acknowledgment of the government's strong interest in labor peace, so long as fees collected represent only the union's costs incurred in the collective bargaining process, and are not directed toward promoting the union's political agenda. *Id.*

ably in dispute while such challenges are pending." In a much discussed footnote apparently intended to clarify what constitutes "adequate disclosure," the Court stated that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.* at 307 n. 18, 106 S.Ct. 1066.

The unions claim that, because the cost of an audit would be unduly burdensome to these relatively small local affiliates, the commission erred in refusing to recognize an exception to the constitutional requirement set forth in *Chicago Teachers Union, Local No. 1 v. Hudson, supra.* The unions also contend that, even if no such exception exists, the commission exceeded its authority in issuing its remedial order that all funds should be returned to the dissenting teachers. We disagree and affirm the commission's decision.

1. Existence of small union exception to the audit requirement. The unions primarily argue that they should be excused from having to provide independently audited financial statements with their fee demands. Despite urging us to adopt this exception the unions cite no authority suggesting that the Supreme Court did not mean exactly what it said in *Chicago Teachers Union, Local No. 1 v. Hudson, supra.* Rather, the unions argue that such a requirement would make it impractical to collect the fees. It should be noted however that, although G.L. c. 150E, § 12, permits the collection of agency fees, it by no means requires them to do so.

Moreover, the United States Court of Appeals for the Ninth Circuit recently rejected with criticism the position the unions now urge us to adopt. *Prescott v. County of El Dorado,* 177 F.3d 1102, 1106-1108 (9th Cir. 1999).

In that case, the local union affiliate was only slightly larger than the unions here. *Id.* at 1104. The Federal District Court had concluded that the plaintiffs were not entitled to an audit in light of the local affiliate's size, reasoning that it could "not accept plaintiffs' position that a union must choose between an audit it cannot afford on the one hand, or being required to countenance [compelled union representation of nonmembers without compensation] on the other." *Prescott v. County of El Dorado,* 915 F.Supp. 1080, 1090 n. 15 (E.D.Cal. 1996). The Court of Appeals disagreed, stating:

> "We do not see how a mere review of the union's records can offer the 'verification' that the Supreme Court and we have spoken of. Audits are often required in business and public arenas, where others seek assurance that the reviewed books of an organization really do reflect the concrete world transactions to which they refer. It is just that kind of assurance that nonmembers are entitled to, even though it may prove somewhat costly to obtain it. As the Second Circuit has pointed out, it is not a question of balancing the cost to the union against the First Amendment rights of the fee payers. 'Excessive cost cannot form the basis for allowing the union or the government to avoid Hudson's requirement that the procedures used by the union to allocate bargaining and administrative costs be carefully tailored to minimize the intrusion on nonmembers' rights.' *Andrews* [*v. Education Ass'n of Cheshire,* 829 F.2d 335, 339 (2d Cir.1987)]. In short, a true audit was required."

Prescott v. County of El Dorado, supra, 177 F.3d at 1107-1108. Although the court in *Andrews v. Education Ass'n of Cheshire, supra* at 340 n. 2, expressly declined

to decide whether a small union's affairs could be so simple as to obviate the audit requirement, its reasoning adopted in *Prescott v. County of El Dorado, supra,* certainly suggests how these courts would resolve the conflict before us in the instant case.

Our own cases are in accord. In *Harrison v. Massachusetts Society of Professors/Faculty Staff Union,* 405 Mass. 56, 64 n. 8, 537 N.E.2d 1237 (1989), we stated quite unequivocally, "*Hudson* requires that the union's 'major categories of expenses' be listed 'as well as verification by an independent auditor.' *Chicago Teachers Union, Local No. 1 v. Hudson, supra* at 307 n. 18, 106 S.Ct. 1066." We said nothing to suggest that the Supreme Court's footnote is to be read narrowly, but rather suggested that the requirement applies, generally, to all union agency fee demands. Furthermore, in *Belhumeur v. Labor Relations Comm'n,* 411 Mass. 142, 145, 580 N.E.2d 746 (1991), *cert. denied,* 503 U.S. 1004, 112 S.Ct. 1759, 118 L.Ed.2d 423 (1992), although we rejected the fee payers' reading of *Chicago Teachers,* we reaffirmed the requirement of audited verification of expenses, reasoning: "An audit of major categories of expenses should tend to assure nonmembers that the union indeed did incur the expenses on which the agency fee was based." We further pointed out that "[t]he information that the union must provide under the *Hudson* opinion is not intended to be dispositive of any dispute. That information is designed only to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined" (emphasis added). *Id.* at 146, 580 N.E.2d 746. Thus, because the unions now before us were also parties in *Belhumeur,* we have previously acknowledged that they remain within the ambit of the Supreme Court's requirement that the verification of

major expenses by an independent auditor is a prerequisite to demanding agency fees under statutes such as G.L. c. 150E, § 12.

We see no basis for modifying the United States Supreme Court's express requirement that a union must accompany any demand for agency fees with an independently audited verification of its major expenses. *Chicago Teachers Union, Local No. 1 v. Hudson, supra* at 307 n. 18, 106 S.Ct. 1066. Succinctly put, there is no exception to *Hudson*'s audit requirement for small local union affiliates.[8]

2. Propriety of commission's remedy. The unions next challenge the commission's remedial order compelling them to return the fees to the teachers absent an audit. They rely on a number of Federal cases for the proposition that such an order would result in a windfall to the teachers and deprive the unions of funds to which they are unquestionably entitled. *See, e.g., Weaver v. University of Cincinnati,* 970 F.2d 1523, 1533-1534 (6th Cir. 1992), *cert. denied,* 507 U.S. 917, 113 S.Ct. 1274, 122 L.Ed.2d 668 (1993); *Lowary v. Lexington Local Bd. of Educ.,* 903 F.2d 422, 432-433 (6th Cir.), *cert. denied,* 498 U.S. 958, 111 S.Ct. 385, 112 L.Ed.2d 396 (1990); *Hohe v. Casey,* 956 F.2d 399, 415-416 (3d Cir.1992); *Gilpin v. American Fed'n of State, County & Mun. Employees,* 875 F.2d 1310, 1313-1316 (7th Cir.), *cert. denied,* 493 U.S. 917, 110 S.Ct. 278, 107 L.Ed.2d 258 (1989); *Laramie v. County of Santa Clara,* 784 F.Supp.

---

[8] In light of our conclusion that *Chicago Teachers Union, Local No. 1 v. Hudson, supra* at 307 n. 18, 106 S.Ct. 1066, requires the unions to provide an independent audit in connection with a demand for agency fees, the unions' argument that the commission acted arbitrarily and capriciously when it declined to follow dicta from its decision in *Malden Educ. Ass'n,* 15 M.L.C. 1429, 1435 n. 10 (1989), is without merit.

1492, 1501-1502 (N.D.Cal.1992). This reliance is misplaced. The unions refer only to cases in which the courts rejected dissenting nonmembers' claims to be excused from having to pay the agency fees even if a properly audited verification is supplied. As we interpret the commission's order, however, the unions are free to renew their demands for any fees to which they may be entitled once they comply with the requirements of *Chicago Teachers Union, Local No. 1 v. Hudson, supra. See Weaver v. University of Cincinnati, supra* at 1534 (rejecting plaintiffs' argument that denying full restitution would encourage unions to disregard *Hudson*'s reasoning that "by granting a preliminary injunction barring continuation of fee collecting when a defective notice has been sent, the courts have a quick and efficient remedy for such a *Hudson* violation"); *Laramie v. County of Santa Clara, supra* at 1500 (permanently enjoining defendants from "taking any action to withhold fair-share fees from plaintiffs' salaries until defendants establish and implement adequate procedural safeguards as described in *Hudson*" and its progeny).

Because it was proper in all respects, we affirm the commission's decision.

So ordered.

Justice FRIED participated in the deliberation on this case, but resigned before the opinion was issued.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
BEFORE THE
LABOR RELATIONS COMMISSION

Case No. ASF-2097
2098
3015
2055
2056
2057

IN THE MATTER OF
WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
FAIRHAVEN EDUCATION ASSOCIATION, *et al.*

and

DAVID DUPUIS *et al.*

Date Issued: October 29, 1997

Commisioners Participating:

Robert C. Dumont, Chairman
Claudia T. Centomini, Commissioner

DECISION AND ORDER

Statement of the Case

Eleanor Dupuis, David Dupuis, Peter Anthony, Charles Cipollini and Betsy Ann Wood filed charges with the Labor Relations Commission (the Commission) alleging that affiliates of the Massachusetts Teachers Association/NEA [1] imposed a service fee for the 1988-89 [2] school year that was based on an invalid demand and that was in excess of the amount permitted by Section 12 of the Law. The Commission investigated the charges and issued separate Complaints of Prohibited Practice that were identical in all material respects. The two-count complaints alleged that the WEA, BEA and FEA violated Section 12 of M.G.L. c.150E (the Law) by demanding an agency service fee without providing the Charging Parties with an independent auditor's financial statement of its revenues and expenses for the relevant time period (Count I) and by demanding an amount in excess of the amount permitted by the Law (Count II). The Unions subsequently filed answers to the Commission's complaints.

On September 20, 1990, the Commission bifurcated the complaints and ordered a formal hearing for the allegation in Count I of the Complaint. Hearing Officer Judith Neumann held a hearing on November 15, 1990, after which the Unions filed a Motion to Reopen the Hearing. The Commission allowed the Motion and subse-

---

[1] The Wareham Education Association (WEA), the Bridgewater Education Association (BEA) and the Fairhaven Education Association (FEA).

[2] Betsy Ann Wood also challenged the service fee demanded by the Wareham Education Association/MTA/NEA for the 1987-88 school year.

quently held a second day of hearing.[3] The parties filed final briefs following the hearing.

The Charging Parties subsequently filed a Motion to Supplement the Record. The Union opposed the Charging Parties' Motion, and Commissioner Dalton held a hearing for the Commission to determine the admissibility and probative value of the evidence proffered by the Charging Parties. Following the hearing, the Union and the Charging Parties submitted supplemental briefs,[4] and former Commissioner William J. Dalton,[5] acting as an administrative law judge, issued Recommended Findings of Facts. Both parties filed Challenges to the Recommended Findings, and responses to the other parties' Challenges.[6]

---

[3] Hearing Officer Neumann left the Commission's employ in October 1992.

[4] The Unions filed a Motion to Strike the references in the Charging Parties' Supplemental Brief that refer to the Lexington Teachers Association as a "small" local union, and a statement describing the size of the Lexington Teachers Association's annual budget. Neither the size of the Lexington Teachers Association nor the size of its budget is a material fact in this case; consequently, we need not decide whether these references in the Charging Parties' Supplemental Brief should be stricken. The Motion is denied.

[5] Commissioner Dalton left the Commission's employ in August 1997.

[6] Subsequently, the Unions filed a Motion to Strike certain references to the Lexington Teachers Association (LTA) that the Charging Parties made in their supplemental brief. Specifically, the Unions objected to the inclusion of the size of the LTA's budget and the Charging Parties' characterization of the LTA as a "small" local union, arguing that this information was not included in the reported decision in the case of *Lowary v. Lexington Board of Education*, 903 F.2d (6th Cir. 1990) and should not be included in the Charging Parties' brief. We did not consider the size of the LTA, or the size of its budget in reaching our decision, and consequently, we need not decide whether this information was inappropriately included in the Charging Parties' supplemental brief. The Motion is denied.

Findings of Fact

Facts Pertaining to ASF-2097, 2098
Bridgewater Education Association

The Bridgewater School Committee is the representative of the Town of Bridgewater for purposes of collective bargaining with employees of the Bridgewater schools. The Bridgewater Education Association/MTA/NEA is an employee organization within the meaning of the Law and is the exclusive collective bargaining representative for the unit of employees that includes David Dupuis and Eleanor Dupuis. The bargaining unit represented by the BEA contained approximately 114 members and two non-members. The BEA and the School Committee are parties to a collective bargaining agreement effective from September 1, 1988 through August 31, 1991 which covers all members of the bargaining unit represented by the BEA. That contract contains an agency fee provision.[7]

David Dupuis and Eleanor Dupuis are public employees within the meaning of the Law. Mr. and Ms. Dupuis were not members of the BEA during the 1988-89 school year and were required to pay an agency fee under the contractual agency service fee provision. On or about June 21, 1989, the BEA demanded that Mr. and Ms. Dupuis pay an agency service fee in the amount of

---

[7] *Article XXVII Agency Fee*

1. The Committee agrees to require, as a condition of employment, that all employees covered by this Contract, except those employees certified as members to the Committee by the Association, pay annually or by dues deduction to the Association, as of the 30th day subsequent to the effective date of this Agreement, or 30 days subsequent to the execution of this Agreement, whichever is later, an Agency Service Fee equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent to or from which membership dues are paid. . .

$275.45 for the 1988-89 school year of which $30.00 was payable to the BEA,[8] $186.95 was payable to the Massachusetts Teachers Association and $58.50 was payable to the National Education Association.[9] Mr. Dupuis and Ms. Dupuis challenged and continue to challenge the amount of the service fee demanded by the BEA for the 1988-89 school year.

The BEA's demand included a letter setting forth the amount of the service fee, the existence of a rebate procedure, the demand itself and the consequences of failure to pay the fee.[10] The letter also stated:

> The amount for this year was calculated after a review of the most recent financial reports available

---

[8] The Unions asked that the Commission modify the Findings of Fact to indicate the actual pro-rated chargeable amounts, and the fact that the fees were limited to the dues amounts, arguing that the reduction simplifies the task of verifying certain expenses. We decline to adopt this finding because the amount of chargeable expenses is not relevant to this decision, nor is the question of whether certain expenses are easier to verify than others.

[9] During 1988-89, BEA dues were $299.00, of which $30.00 was payable to the BEA, $191.00 was payable to the Massachusetts Teachers Association (MTA), and $78.00 was payable to the National Education Association (NEA).

[10] The Unions challenge this fact by asking the Commission to clarify that the demand letter disclosed to the Charging Parties the amount of the service fee due to each of the affiliated unions. This is one of many additional findings of fact that the Unions have requested for the purpose of gauging the sufficiency of the information provided regarding the local's expenditures. Our decision in this case is based on our interpretation of *Chicago Teachers Union vs. Hudson*, 475 U.S. 292 (1986) and its progeny, as well as the uniqueness of an audit, and does not depend on the condition of these Unions' financial records or the specific information contained in their demands. Consequently, we need not supplement or otherwise modify the Recommended Findings of Fact in which the demands, the Unions' financial records, or the treasurers' affidavits are described.

> to the Local, MTA, and NEA. A detailed explanation of the way the Local, MTA and NEA portions of the agency fee were calculated is enclosed. . .
>
> In accordance with a decision of the Labor Relations Commission, you are entitled, upon request, either to obtain from the Local a list of all expenditures or to examine the Local's financial receipts and record of expenses at a time convenient to you and to the Local. . . .[11]
>
> The financial information recorded in this explanation was prepared by the undersigned based on the actual financial records of the Association for the 1987-88 fiscal year. In order to determine if an expense was chargeable or nonchargeable, I relied on the criteria set forth in 456 CMR 17.04 and the instructions included herein. In signing this form, I certify that the information contained herein is a true and accurate reflection of the Association's actual expenditures during the 1987-88 year to the best of my knowledge and ability. Signed under the pains and penalties of perjury.[12]

The demand also included a "Local Association Agency Fee Explanation" describing how the Local calculated its share of the service fee, and a book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information." This book contained

---

[11] The Unions asked the Commission to modify the Findings of Fact to state that no evidence exists indicating that Mr. Dupuis or Ms. Dupuis ever requested a list of expenditures or the opportunity to examine the BEA's financial receipts and records. We decline to make this finding because an individual fee payor's willingness or reluctance to personally review a union's financial records is not germane to our decision.

[12] This statement was signed by the BEA treasurer but was not notarized.

a CPA's audit of the NEA and MTA. The BEA's demand did not provide Mr. Dupuis or Ms. Dupuis with an independent auditor's financial statement of its revenues and expenses for the fiscal year preceding the period for which the fee was demanded.

The financial records of the BEA include the following documents: [13]

A master list of expenses listing check numbers, payees and amounts
6 ledger pages
Approximately 68 check stubs listing the payee
Approximately 68 cancelled checks [14]
Approximately 26 records of deposits
1 savings withdrawal slip
Monthly bank statements
Record of income
Approximately 52 receipts or invoices [15]

---

[13] The Unions asked the Commission to add findings of fact further describing the condition of the Unions' financial records and noting the simplicity of verifying expenditures. As we discuss in the decision below, an auditor's ability to test and verify expense documentation is central to our decision and the record contains no evidence demonstrating that an individual fee payor could test this information in the same manner. Consequently, we decline to subjectively assess the ease with which an individual fee payor could verify union expenses, or describe the judgment a fee payor would be in a position to make after reviewing a union's financial records.

[14] Checks listed the payee and frequently contained a one or two word description; however, the meanings of the descriptions were not always readily apparent. Some of the checks were supported by disbursement records, in varying degrees of detail and formality, and others were not. In one instance, the payor wrote a check to himself, ostensibly for a "stipend".

[15] Some, but not all, of the invoices contained the check number of the check which paid the item. However, the master expenditure list identified the check that paid the invoice. By matching the checks and invoices it was possible to get a general idea of where most of the money was spent, although some of the descriptions were vague or unclear.

A passbook from the Bridgewater Credit Union
A two-page summary of operations prepared by the BEA treasurer

The BEA's total income for the 1987-88 school year was $44,794.40, and it forwarded $26,874.00 in dues and $444.44 in agency service fees to the MTA and NEA.

Facts Pertaining to ASF-3015, 2055, Wareham Education Association

The Wareham Education Association (WEA) is an employee organization within the meaning of the Law and is the exclusive bargaining agent for the unit of employees which includes Betsy Ann Wood (Wood). The bargaining unit represented by the WEA contained 204 members and one non-member. The Wareham School Committee represents the Town of Wareham in collective bargaining with employees of the Wareham schools. The WEA and the Wareham School Committee are parties to a collective bargaining agreement effective from September 1, 1988 through August 31, 1991. That contract contains an agency fee provision.[16]

Wood is a public employee within the meaning of the Law. Wood was not a member of the WEA during 1987-

---

16 *Article XXXVI Agency Fee*

A. The Committee agrees to require, as a condition of employment, that all employees covered by this Agreement, except those employees certified as members to the Committee by the Association, pay annually or by dues deduction to the Association, as of the thirtieth (30th) day subsequent to the effective date of this agreement, or thirty (30) days subsequent to the execution of this Agreement, whichever is later, an Agency Fee as determined in accordance with the applicable Rules and Regulations of the Labor Relations Commission relative to the Agency Service Fee. . . .

88 or 1988-89 and was required to pay an agency fee under the contractual agency fee provision.

On or about July 3, 1989, the WEA demanded that Wood pay an agency service fee in the amount of $262.73 for the 1988-89 school year of which $30.00 was payable to the WEA, $174.23 was payable to the MTA and $58.50 was payable to the NEA.[17] On or about October 13, 1989, the WEA demanded that Wood pay an agency service fee in the amount of $242.63 for the 1987-88 school year of which $29.18 was payable to the WEA, $157.57 was payable to the MTA and $55.88 was payable to the NEA.[18] Wood challenged and continues to challenge the amount of the service fee demanded by the WEA for the 1987-88 and 1988-89 school years.

The WEA's demands included letters setting forth the amount of the service fee, the existence of a rebate procedure, the demand itself and the consequences of failure to pay the fee. The letters also stated:

> The amount for [the 1987-88 and 1988-89] school years was calculated after a review of the most recent financial reports available to the Local, MTA, and NEA. A detailed explanation of the way the Local, MTA and NEA portions of the agency fee were calculated is enclosed. . . .
>
> In accordance with a decision of the Labor Relations Commission, you are entitled, upon request, either to obtain from the Local a list of all expenditures or to examine the Local's financial receipts and record

---

17 During 1988-89, WEA dues were $299.00, of which $30.00 was payable to the WEA, $191.00 was payable to the MTA, and $78.00 was payable to the NEA.

18 During 1987-88, Association dues were $283.00, of which $30.00 was payable to the WEA, $178.00 was payable to the MTA, and $75.00 was payable to the NEA.

> of expenses at a time convenient to you and to the WEA. . . .

The 1988-89 demand also contained the following language:

> The financial information recorded in this explanation was prepared by the undersigned based on the actual financial records of the Association for the 1987-88 fiscal year. In order to determine if an expense was chargeable or nonchargeable, I relied on the criteria set forth in 456 CMR 17.04 and the instructions included herein. In signing this form, I certify that the information contained herein is a true and accurate reflection of the Association's actual expenditures during the 1987-88 year to the best of my knowledge and ability. Signed under the pains and penalties of perjury.[19]

The demands for both school years also included a "Local Association Agency Fee Explanation" describing how the Local calculated its share of the service fee, and a book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information." This book contained a CPA's audit of the NEA and MTA. The demands did not provide Wood with an independent auditor's financial statement of its revenues and expenses for the fiscal years preceding the periods for which the fees were demanded.

The WEA's financial records consisted of:

> Ledger pages
> Approximately 40 cancelled checks, containing a one or two word description of the expenditure
> Approximately 48 check stubs

---

[19] This statement was signed by the WEA treasurer but was not notarized.

Approximately 21 receipts or invoices [20]
Monthly bank statements
Monthly treasurer's reports
An accountant's summary of operations.

The WEA's income in 1987-88 was $60,303.02 and it forwarded $50,881.00 in dues to the MTA/NEA.

Facts Pertaining to ASF-2056, 2057, Fairhaven Education Association

The Fairhaven School Committee is the representative of the Town of Fairhaven for purposes of collective bargaining with employees of the Fairhaven schools. The Fairhaven Education Association (FEA) is an employee organization within the meaning of the Law and is the exclusive bargaining agent for the unit of employees which includes Cipollini and Anthony. The bargaining unit represented by the FEA contained 178 members and seven non-members. The FEA and the School Committee were parties to a collective bargaining agreement effective from September 1, 1986 through August 31, 1989. That contract contained an agency fee provision.[21]

---

[20] Copies exist of most of the invoices, and most of the invoices list the check numbers for the check that paid the bill. There are some handwritten notes in lieu of invoices for some expenses with no supporting verification.

[21] *Article 32. AGENCY FEE*

32:1 The Committee agrees to require (during the term of this Agreement) that all employees covered by this Agreement except those employees certified to the Committee by the Association as being members of the Association as of the 45th day of their employment or the 30th day after the effective date of this Agreement, whichever is later, shall pay to the Fairhaven Educators' Association a service fee set by the Association which fee shall not exceed the amount of dues paid to the Association by a regular active member. . .

Charles Cipollini and Peter R. Anthony are public employees within the meaning of the Law. Cipollini and Anthony were not members of the FEA during 1988-89 and were required to pay a contractual agency service fee. On or about June 27, 1989, the FEA demanded that Cipollini and Anthony pay an agency service fee in the amount of $290.45 for the 1988-89 school year of which $45.00 was payable to the FEA, $186.95 was payable to the MTA and $58.50 was payable to the NEA.[22]

The FEA's demand included a letter setting forth the amount of the service fee, the existence of a rebate procedure, the demand itself and the consequences of failure to pay the fee. The letter also stated:

> The amount for this year was calculated after a review of the most recent financial reports available to the Local, MTA, and NEA. A detailed explanation of the way the Local, MTA and NEA portions of the agency fee were calculated is enclosed. . .
>
> In accordance with a decision of the Labor Relations Commission, you are entitled, upon request, either to obtain from the Local a list of all expenditures or to examine the Local's financial receipts and record of expenses at a time convenient to you and to the Local. . . .
>
> The financial information recorded in this explanation was prepared by the undersigned based on the

---

[22] During 1988-89, FEA dues were $314.00, of which $45.00 was payable to the FEA, $191.00 was payable to the MTA, and $78.00 was payable to the NEA.

On January 19, 1988, the FEA made a demand upon Anthony and Cipollini for an agency fee for the 1987-88 school year. On June 28, 1989, this 1987-88 agency fee demand was withdrawn and the charges filed by Cipollini and Anthony were subsequently dismissed.

> actual financial records of the Association for the 1987-88 fiscal year. In order to determine if an expense was chargeable or nonchargeable, I relied on the criteria set forth in 456 CMR 17.04 and the instructions included herein. In signing this form, I certify that the information contained herein is a true and accurate reflection of the Association's actual expenditures during the 1987-88 year to the best of my knowledge and ability. Signed under the pains and penalties of perjury.[23]

The demand also included a "Local Association Agency Fee Explanation" describing how the Local calculated its share of the service fee, and a book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information," which included a CPA's audit of the NEA and MTA. The FEA's demand did not provide Cipollini and Anthony with an independent auditor's financial statement of its revenues and expenses for the fiscal year preceding the period for which the fee was demanded.

Cipollini and Anthony challenged and continue to challenge the amount of the service fee demanded by the FEA for the 1988-89 school year. On March 10, 1988, the Charging Parties filed charges challenging the 1987-88 agency fee and the Commission held an investigation.[24] At the investigation Anthony, Cipollini and their attorney Bruce Cameron, were present. Pursuant to Cameron's request, the FEA brought its financial books and records to the investigation. However, the FEA refused to allow Cameron to review the books—allowing only Cipollini

---

23 This statement was signed by the FEA treasurer but was not notarized.

24 This demand was subsequently withdrawn.

and Anthony to review them. Both Cipollini and Anthony refused to review the books unless they could be assisted by counsel. Cipollini and Anthony never asked to review the FEA financial records related to the 1988-89 demand because they believed, based on the events related to the 1987-88 demand, that Cameron would not be able to assist them.[25]

The financial records of the Fairhaven Education Association consist of the following: [26]

Summary journals listing the year's expenditures; each expenditure lists a short description

Monthly treasurer's reports

Monthly bank statements and approximately 146 cancelled checks [27]

Bank deposit slips

Check stubs

A financial statement from accountant Robert Yeaton

An "expense voucher" form for each expenditure [28] and copies of the pertinent invoices and check stubs which are attached to the forms.

---

[25] We have modified this finding of fact, at the request of the Unions, to clarify the events in question.

[26] The Unions asked the Commission to find that their financial records provided sufficient information about the reliability of the expenditures included in the demand that non-members could make an informed decision to either challenge the fee or pay their fair share. We decline to adopt this finding because it is not factually or legally correct.

[27] Many checks contain no description of the expenditure.

[28] We have not relied on Appendix D in our findings of fact because the parties agreed that the form marked as Appendix D in the Recommended Findings was not the form used for most FEA expenditures.

The FEA's gross income for 1987-1988 was $65,000.00 and it paid $36,268.00 in dues to the MTA/NEA/BCEA.

Kinds of Audits and Procedures

There are three levels or kinds of service that an accountant or auditor can provide of an entity's financial statements: a compilation, a review and an audit. The purpose of these services is to determine and disclose the level of reliance which can be placed on an entity's financial statements. Each level of service consists of three components: a report, a set of financial statements,[29] and notes accompanying the financial statements. Although the financial statements and accompanying notes are generally the same for each level of service, the report differs significantly depending on whether the service performed is a review, a compilation or an audit.

A compilation is the lowest level of service and offers no assurance that the numbers listed in the financial statements are fairly stated. In a compilation, an accountant [30] receives financial information from the management of an entity, reviews the figures for clerical errors and records the figures in the form of financial statements. The accountant may also discuss the accounting policy with management and try to identify any issues that were not in conformity with generally accepted accounting principles and issues a report. The accountant is not required to make inquiries or perform other procedures to verify, corroborate or review information supplied by the entity.

---

[29] A financial statement includes a balance sheet, income statements and a change in fund balance statement.

[30] There is no difference in licensing between an auditor and an accountant but the terms differ according to which level of service is being performed.

The review is the next level of service in which an accountant performs limited testing of the figures listed on the financial statements using analytical procedures and inquiries of management. The objective of a review is to provide a reasonable basis for an accountant to express limited assurance that there are no material modifications that should be made to the financial statements. A review requires no actual testing of documentation. Instead, the accountant reviews the accounting books and journals and relies on verbal inquiries of management.[31] Specifically, the accountant performs an analytical review of the listing of accounts at year end, as well as a comparative analysis from year to year to look for consistency or unusual changes. The accountant also compares actual results to the entity's budget. Depending on whether problems existed with the analysis, the accountant would look for schedules that were tied to the listing of accounts, i.e. at cash to see if a bank reconciliation was completed. Finally, the auditor generates the report, the financial statements, and the note disclosures.[32] Because these procedures are used, the review is more reliable than a compilation.

The audit is the highest level of service. The objective of the audit is to express an auditor's opinion on the

---

31 In contrast, an audit confirms the verbal inquiries through supporting documentation.

32 The Charging Parties have asked us to add the following sentence to the Findings of Fact: [a]ll information included in those financial statements, including the note disclosures, are the representations of union officials and not of the auditor. The record, specifically, the *AICPA Codification of Statements on Standards for Accounting and Review Services*, AR Section 100.32(b), provides in pertinent part that "[a]ll information included in the financial statements is the representation of the management (owners) of the entity." We amend the Findings of Fact to add the quoted portion of the AICPA Codification.

extent to which the financial statements fairly present, in all material respects, the entity's financial position, results of operations and cash flows, in conformity with generally accepted accounting principles.

An auditor employs the following procedure when performing an audit. First, the auditor reviews the entity's internal controls—its internal procedures and accounting system—to determine the level of risk and the auditor's level of reliance.[33] Based on this information, the auditor determines which testing methodology to use, either the substantive approach or the compliance approach. In the substantive approach, the auditor places no reliance on internal control and tests all the account balances in detail (over the materiality level[34]) by physically viewing the supporting documentation. For example, the auditor could review every check and invoice written on a particular account to ensure that the amounts matched and proper approval process was followed, using their judgment to determine how many accounts to review. The auditor could also review leases to determine whether payment matched the lease agreement. Conversely, in the compliance approach the auditor relies on internal controls and tests the accounting cycles, thereby reducing the amount of substantive testing that would be necessary.

In addition, the auditor completes the confirmation process by sending confirmation requests to banks (for loans or cash), or others for accounts receivable and accounts payable. Finally, the auditor considers subsequent events, such as whether a loss of assets occurred

---

[33] If one person performs all the financial recordkeeping and there is no segregation of duties, an auditor would place little reliance in the entity's internal controls.

[34] "Materiality" is a term used to express an auditor's level of acceptable error in financial statements.

after the fiscal period or whether litigation existed which would substantially change the financial picture.

There are certain limitations inherent in the auditing process. For example, the American Institute of Certified Public Accountants (AICPA) *Codification of Statements on Auditing Standards* provides in part that:

> Because of the characteristics of irregularities, particularly those involving forgery and collusion, a properly designed and executed audit may not detect a material irregularity. For example, generally accepted auditing standards do not require that an auditor authenticate documents, nor is the auditor trained to do so. Also, audit procedures that are effective for detecting a misstatement that is unintentional may be ineffective for a misstatement that is intentional and is concealed through collusion between client personnel and third parties or among management or employees of the client.

Costs of Audits

There is no standard fee for auditing services. One approach is to estimate the number of hours within each line item for each level of service, apply a rate and compute the estimated cost. Occasionally, however, additional services such as accounting services, are necessary to complete the audit, and those services would increase the overall cost. Other considerations in the cost of an audit are the possibility of future business with the entity, the audit risk,[35] competitive forces affecting the profes-

---

[35] In his findings of fact, Commissioner Dalton stated that the term "audit risk" was not defined in the record. Both parties subsequently directed our attention to the *AICPA Codification of Statements on Auditing Standards* AU Section 312. AU Section 312.02 defines audit risk as the risk that the auditor may unknowingly fail to appropriately modify his opinion on financial statements that are materially misstated. The concept of audit risk is further defined and explained in the remainder of Section 312.

sion and the client's ability to generate the necessary schedules.

Auditing procedures do not differ based on an entity's annual income; consequently, the cost of an audit would be the same for a union with a small income as it would be for a union with a larger income.

Actual Costs of Audits:

In 1989, the accounting firm of Daniel Dennis & Company audited the financial statements of the local unions in Springfield, Chicopee, Newton and Taunton and charged the following fees: [36]

Springfield—$3,460.74
Chicopee—$2,811.50
Newton—$2,230.36
Taunton—$4,105 [37]

The MTA subsequently paid for these audits.[38]

The March 27, 1991 Letter

Charles Baldwin (Baldwin) has been employed by the MTA since 1974 as a regional services consultant. In

---

[36] The Charging Parties asked us to add to the findings of fact, the cost of the Malden audit and the number of audit hours required for each of the Springfield, Chicopee, Newton, Taunton and Malden locals. We did not consider the condition of these unions' financial records in reaching our decision; consequently, the number of hours required to audit these locals' financial statements is not a material fact. We decline to add the cost of the Malden audit because that evidence is superfluous.

[37] The cost of this audit included fees for accounting services. The accounting services were necessary to bring the records to the point where they could be audited.

[38] As of April 27, 1992, it was the only time that the MTA paid for audits for those unions.

that capacity, he provides advice and counsel concerning collective bargaining and member advocacy issues to various MTA affiliated local unions. His specific duties include serving as the chief spokesman at negotiating sessions, representing local unions in unfair labor practice cases and arbitrations, advising local unions on grievances and unfair labor practice cases and helping to process grievances. He also serves as a liaison between local unions and the MTA. Baldwin is not a CPA, has no background or degree in accounting and is unfamiliar with the different levels of service that an auditor or an accountant can provide.

In November of 1990, Baldwin discovered that the treasurer of the Springfield Education Association (SEA) overpaid himself a stipend.[39] The total amount of the overpayment was $180.00. Baldwin informed the SEA president of this action and they confronted the treasurer on or about the following day. The treasurer confirmed the overpayment, relinquished his union office keys and submitted a resignation in which he included a promise not to run for union office again.[40]

In March of 1991, the president of the Pathfinder Teachers Association (PTA) told Baldwin that the treasurer of the PTA had five checks from the School Department sitting on his bureau at home, and he had not de-

---

[39] The Unions asked us to delete the names of the two local unions whose circumstances prompted Charles Baldwin to write the March 27 letter. Although the identity of these local associations is irrelevant to our decision, we decline to sanitize Commissioner Dalton's description of the events because it is not the Commission's practice to purposely withhold the identity of entities or individuals involved in wrongdoing.

[40] The Charging Parties asked us to add additional facts to this paragraph regarding any subsequent MTA or SEA investigation into the activities of the SEA treasurer in prior years. The requested facts are not germane to our decision and are unnecessary.

posited those checks.[41] The PTA president immediately secured the treasurer's resignation, including a promise not to run for union office again, took possession of the checks and deposited them into the PTA's bank account.

Baldwin discussed these incidents with CPA Michael O'Neil, MTA Director of Affiliate Services Robert Bonazzi, MTA General Counsel Ann Clarke and MTA Regional Manager Ralph Flynn. On March 27, 1991, he wrote the following letter to MTA Executive Director-Treasurer Edward Sullivan: [42]

> During November of 1990 and again in March of 1991, I was forced to play a significant role in removing from office two local treaurers. One was removed for malfeasance and the other for nonfeasance. These experiences were personally unpleasant and professionally disturbing.
>
> As a result of speaking with Mike O'Neil from our C.P.A. firm during the March incident, I became more concerned. Mike ran off a list of six other locals that apparently had suffered similar problems. I have talked to Bob Bonazzi on the telephone about this, but I also felt compelled to write to you.
>
> There are many obvious consequences to our locals and to MTA when local treasurers disregard their fiduciary responsibilities and obligations. It seems to me that we need to take some steps to protect our members, our locals and MTA from this type of financial danger.

---

[41] The Unions challenged this finding of fact and we have modified it based on the record evidence.

[42] When Baldwin wrote the letter, he did not know if an audit would expose these kinds of incidents, but believed that an audit might prevent their recurrence. O'Neil did not suggest this to Baldwin during their previous conversation.

One way of helping would be to make it disadvantageous for our locals not to have their books audited each year. We could require that as a condition of receiving local office support and the bonding of the local treasurer that each local submit proof of an annual audit. The proof could be the front page of the auditor's report. (This wouldn't result in the local opening their books to MTA, which I think could be politically messy).

This is only one way of trying to protect everyone, and it may be unworkable or politically impractical. I am sure there must be other ways as well. But I am concerned and felt an obligation to bring it to your attention.

I am copying this letter to Ann Clarke and Ralph Flynn because I have also discussed the problem with them.

P.S. On the advice of Ann Clarke, the members in both locals are not aware of the real reasons for the treasurers resignations. Only certain officers in both locals know the truth in order to preserve confidence in the Association. Therefore, please do not divulge the identity of the two locals without first contacting me. Hopefully, you will not have to divulge the identity in any event.

The Relationship Between The Locals, the MTA and NEA.

Local unions affiliated with the MTA and NEA [43] collect dues for the MTA and NEA from their members and transmit dues to them. If the dues have not been

[43] The NEA is a nonprofit corporation incorporated under a special act of the United States Congress.

duly transmitted to the MTA, any members elected as a delegate to the MTA convention will not receive credentials and will not be seated at the annual meeting.

The MTA offers a local support program to all local affiliated associations who comply with specified requirements.[44] This program provides a limited amount of financial support from the MTA in order to defray part of the cost of operating local associations. The amount of support is based on the local dues—the higher the dues, the higher the reimbursement, up to a maximum of $20 per member and 50% of their office expenses. Specifically, office support is available to offset the cost of the expenses in the following categories:

1. office-related expenses: (rent, telephone, utilities, equipment, office supplies, printing, insurance, paper, clerical services, payroll taxes and audit costs).

2. compensation paid to local officers, committee chairs and committee members.

3. conferences: registration fees at MTA-approved conferences and hotel room costs at the Annual Meeting.

In 1987-88, the Fairhaven Education Association, Bridgewater Education Association and Wareham Education Association received local support.[45]

---

[44] To receive local office support, the associations must annually certify the amount of their dues and expenses as well as certify that the financial statements have been audited or reviewed. They must also submit their per capita dues and requests for reimbursement on a quarterly basis and certify the amount of local dues for the succeeding fiscal year on or before September 15. The local office support guidelines also contain notification that the MTA reserves the right to audit the local's records in the event MTA deems it necessary.

[45] We have modified this finding to accurately reflect the record evidence.

In 1988-89, the MTA was the statewide affiliate of 297 local unions.[46] Of these, 30 had income in excess of $25,000 per year. The largest annual local income was $311,172 and the smallest annual local income was $320.00. Eight locals wrote more than 400 checks per year, nine wrote more than 350, thirteen wrote more than 300, fifteen wrote more than 250 and nineteen wrote more than 200.

The NEA has a "uniserve" program whereby the NEA provides grants to its state affiliates to assist in funding staff representatives whose responsibilities are to implement, improve and coordinate programs of the NEA. The NEA also provides a bonding program for local treasurers.

The MTA and NEA Combined Agency Service Fee Information for 1988-89 and related information disclosed that the MTA had a total of 60,577 full-time equivalent members and agency fee payers and the NEA had a total of 1,824,500 members. MTA's income was $12,973,-612.00 and NEA's income was $117,901,750.

DECISION

M.G.L. c. 150E, Section 12, as limited by the First Amendment to the United States Constitution, permits public sector unions to collect service fees from non-members to cover their pro rata share of the costs of collective bargaining and contract administration. *Springfield Education Association v. James Belhumeur et al.*, 23

---

[46] The Charging Parties asked us to add to the findings of fact, information pertaining to the number of MTA affiliated locals whose collective bargaining agreements do not contain an agency service fee provision, and the relationship between a local union's size and the existence of a service fee provision in its bargaining agreements. Because the number of local unions ungoverned by agency service fee provisions is not probative of any issue in this case, we decline to make these additional findings.

MLC 233, 234 (1997); *Lyons v. Labor Relations Commission*, 397 Mass. 498 (1986). However, a union demanding a service fee from non-members must satisfy constitutional and statutory requirements. First, the union must provide an escrow procedure for all amount charges and a rebate procedure, at the time the fee is demanded, that provides for prompt adjudication before a neutral arbitrator. The service fee demand must conform to the requirements of Commission Rule 17.03 (456 CMR 17.03) and must be accompanied by sufficient information to allow the fee payor to determine whether the fee payor should challenge the fee. Finally, the amount of the fee must be calculated correctly based on chargeable expenses. *School Committee of Greenfield vs. Greenfield Education Association*, 385 Mass. 70 (1982); *Malden Education Association*, 15 MLC 1429 (1989).

Here, we must determine what information should accompany a service fee demand. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), the United States Supreme Court stated that "[t]he Union need not provide non-members with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." In this decision, we shall consder whether these local unions were required to provide a local audit along with their service fee demands.

The Commission addressed this general issue in *Malden Education Association*, 15 MLC 1429 (1989) when it considered whether the Malden Teachers Association violated the Law by failing to provide adequate, audited financial information about the agency service fee to fee payor Joseph O'Connell. Consistent with its practice of applying Section 12 of the Law constitutionally, the Com-

mission considered the amount and kind of information that Section 12 requires unions to provide with the demand. The Commission held that *Chicago Teachers Union v. Hudson* requires a union to provide, *inter alia*, a copy of an independent auditor's financial statement of revenue and expenses for the fiscal year preceding the period for which the fee is demanded. However, in a footnote, the Commission suggested that small unions may satisfy this disclosure requirement by supplying to fee payers a sworn affidavit from a responsible union officer, attesting to the accuracy of the figures underlying the union's fee calculations, and written assurance of either a list of the union's expenditures or access to the union's financial receipts and expense records. *Malden*, 15 MLC at 1435, n.10. The Unions have cited this portion of the decision as the basis for not supplying an audited financial statement with their service fee demands.

Courts, as well as the Commission, have recognized the financial burden that an audit could place on a union. In *Sheridan v. Intern. Broth. Electrical Workers, Local 455*, 940 F.Supp. 368, 375 (D. Mass. 1996), the District Court for the First Circuit noted that giving fee payors adequate financial disclosure may be time consuming and expensive. Nevertheless, courts have held that verification by an independent auditor is a binding, constitutional requirement notwithstanding the potentially onerous financial implications, *Reese v. City of Columbus*, 826 F. Supp. 1115, 1119 (S.D. Ohio 1993) *aff'd. in part, rev'd. in part on other grounds*, 71 F.3d 619 (6th Cir. 1995); *Browne v. Wisconsin Emp. Relations Comm'n.* 485 N.W. 2nd 376, 394 (1992); *Sheridan*, 940 F. Supp. at 377. and have declined to exempt small unions from this rule. *Reese*, 826 F. Supp. at 1119, *citing Lowary v. Lexington Local Bd. of Educ. (Lowary II)*, 903 F.2d 422 (6th

Cir.), *cert. denied*, 498 U.S. 958 (1990).[47] The rationale for these decisions stems, in large part, from the courts' reluctance to balance the competing interests of the unions and fee payors or to subordinate the fee payors' constitutional rights to the unions' financial interests. *See Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987).

In addition, courts have recognized the important and unique role that an independent auditor plays in ensuring that fee payors have sufficient information to gauge the propriety of a union's fee. Specifically, an auditor ensures that the expenditures that the union claims it made for certain expenses were actually made for those expenditures, *Andrews v. Education Association of Cheshire*, 829 F.2d at 340, and the auditor's ability to test and verify expenditures is a critical concern. *Gwirtz v. Ohio Education Assoc.*, 887 F.2d 678, 681 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990). In *Tierney v. City of Toledo ("Tierney III")*, 135 LRRM 2801, 917 F.2d 927 (6th Cir. 1990), the appeals court remanded the case to a magistrate to determine whether the auditor utilized adequate procedures to verify the union's expenses; reasoning that "[d]isclosure of the major categories of expenses and the methodology of the agency fee calculations means

---

[47] Generally, courts have declined to allow local unions to use a "local presumption" to avoid providing detailed audited financial statements to non-members. *See Reese v. City of Columbus*, 826 F. Supp. 1115 (S.D.Ohio 1993); *Hohe v. Casey*, 956 F.2d. 399 (3rd Cir. 1992). *But see Browne v. Wis. Emp. Relations Com'n.*, 485 N.W. 2nd 376 (1992) (Modified local presumption sufficient where an independent auditor verifies that locals' expenditures always have a lesser percentage of nonchargeable expenses than the statewide affiliate.) A local presumption is a presumption that the local union's percentage of chargeable activities is at least as great as the percentage of chargeable activities of the local's statewide affiliate.

very little if the non-members cannot have some level of confidence in the verification of the expenditures." The appeals court for the District of Columbia Circuit expressed a similar sentiment in *Ferriso v. N.L.R.B.*, 156 L.R.R.M. 2321, 2324 (1997), a case arising under the National Labor Relations Act, by stating that ". . . non-members cannot make a reliable decision as to whether to contest their agency fees without trustworthy information about the basis of the union's fee calculations . . . and an independent audit is the minimal guarantee of trustworthiness." An individual fee payor with access to all of the union's checks and invoices may be able to review the union's expense information, but there is no evidence in the record before us that they could verify or test the documentation the way an auditor could.

Because an auditor's ability to test and verify expense documentation is a paramount concern, we reject the Unions' argument that a review, rather than a full audit, is constitutionally sufficient. In a review, an accountant relies on analytical procedures and inquiries of management to determine the level of reliance to place on financial statements, and performs no actual testing of documentation. Conversely, an auditor tests and verifies documents as a basis for an opinion on financial statements. *Contra. Prescott v. County of El Dorado*, 915 F. Supp. 1080 (E.D. Cal. 1996) (District Court upholds the constitutionality of a review.) The Unions also argue that a separate audit of the locals' expenses is unnecessary because the locals' chargeable expenses constitute a minuscule fraction of the combined chargeable expenses of all three affiliated unions, and because the majority of the chargeable expenses were verified in the MTA and NEA audits. This argument is meritless. None of the locals' expenses were verified in the MTA or NEA audit and the size of the local portion of the combined chargeable ex-

penses is as constitutionally insignificant as the size of the local itself.

As we stated in *Springfield Education Association v. James Belhumeur et al.*, 23 MLC 233, 236 (1997), we must recognize and accommodate divergent interests when interpreting and applying the Law: in this case, the fee payors' quest for sufficient information and the unions' desire to preserve their financial resources. We hold today that Section 12 of the Law requires unions, regardless of size, to provide an audit from an independent auditor along with their service fee demands, and that countervailing financial considerations do not justify an exception to this rule.[48]

We agree with the Second Circuit that *Hudson* procedures are to be accorded all non-members regardless of whether the union believes them to be excessively costly. *Andrews v. Education Association of Cheshire*, 829 F.2d at 340. However, we recognize that a full audit may encompass procedures and issues, like a union's income or assets, that exceed the scope of a fee payor's concern and we agree that "[a] union need not engage its auditors to perform the highest possible level of audit service." *Sheridan*, 940 at 377, *citing Gwirtz v. Ohio Educ. Ass'n.*, 887 F.2d 678, 680 (6th Cir. 1989) *cert. denied*, 494 U.S. 1080 (1990). The primary responsibility of an auditor in this context is to verify a union's calculations and disbursements. *Sheridan* at 377; *see also Belhumeur v. Labor Relations Commission*, 411 Mass. 142, 145 n.4 (1991) (The verification requirement seems to be merely verification of the major categories of expenses). The record in

---

48 We decline to follow any contrary dicta contained in the *Malden* decision and therefore do not address the Unions' arguments concerning the standard by which to determine which unions merit the *Malden* exemption.

this case did not contain evidence concerning whether an audit can be limited in scope, or whether an auditor can express an opinion only on specified elements in a financial statement; [49] therefore, we decline to state whether a limited audit would be sufficient. We hold only that the demands at issue were invalid because the locals' expenditures were never audited, and we leave to another case, a determination of whether a limited audit or special auditor's report is permissible under the Law.

CONCLUSION

For the foregoing reasons, we find that the Unions violated Sections 12 and 10(b)(1) of the Law by failing to provide the Charging Parties with a local audit for the fiscal years preceding the periods for which the fees were demanded.

ORDER

WHEREFORE, based upon the foregoing, it is ORDERED that the Bridgewater Education Association, the Fairhaven Education Association and the Wareham Education Association [50] shall:

1. Cease and desist from requiring the Charging Parties to pay an agency service fee for the 1988-89 school year based on the invalid demands.
2. Not seek the discharge of or any other sanction against any Charging Parties for failing to pay

---

[49] The *AICPA Codification of Statements on Auditing Standards* provides procedures in AU Action 622 for "Special Reports—Applying Agreed-upon Procedures to Specified Elements, Accounts or Items of Financial Statement." However, there was no witness testimony in the hearing explaining the feasibility of using special reports in the agency service fee context.

[50] This remedy shall also apply to the agency service fee that the WEA demanded of Betsy Ann Wood for the 1987-1988 school year.

an agency service fee for the 1988-89 school year that was based on the invalid demands.

3. Release to the Charging Parties all of the monies held in joint escrow, plus all accrued interest to the date of the dissolution of the escrow account for the agency service fees for the 1988-89 school year.
4. Post in all places where notices are normally posted for employees represented by the Associations, and leave posted for a period of not less than thirty (30) days, copies of the attached Notice to Employees.
5. Notify the Commission in writing within ten (10) days of receipt of this decision of the steps taken to comply therewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

/s/ Robert C. Dumont
ROBERT C. DUMONT, Chairman

/s/ Claudia T. Centomini
CLAUDIA T. CENTOMINI, Commissioner

Appeal Rights

Pursuant to M.G.L. c.150E, Section 11, decisions of the Labor Relations Commission are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such appeal, the appealing party must file a Notice of Appeal with the Labor Relations Commission within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

NOTICE TO EMPLOYEES

Posted by Order of
The Massachusetts Labor Relations Commission
An Agency of the Commonwealth of Massachusetts

The Massachusetts Labor Relations Commission has determined that the Bridgewater Education Association, Wareham Education Association and the Fairhaven Education Association violated Sections 12 and 10(b)(1) of M.G.L. c.150E by failing to provide the Charging Parties with a local audit for the fiscal years preceding the periods for which the agency service fees referred to in this case, were demanded.

WE WILL NOT do anything that interferes with, restrains, or coerces any employee in the exercise of their rights guaranteed under M.G.L. c.150E.

WE WILL NOT seek the discharge of or any other sanction against any Charging Party for failing to pay an agency service fee for the 1988-89 school year, or against Betsy Ann Wood for the 1987-1988 school year, that was based on the invalid demands.

WE WILL release to the Charging Parties all of the monies held in joint escrow, plus all accrued interest to the date of the dissolution of the escrow account for the agency service fee for the 1988-89 school year, and to Betsy Ann Wood, all of the monies and interest for the agency service fee for the 1987-1988 and 1988-1988 school years.

WE WILL provide a local audit with any demand for a local agency service fee.

_____

Fairhaven Education Association

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Commission's Office, 1604 Leverett Saltonstall Building, 100 Cambridge Street, Boston, Massachusetts (Telephone: 727-3505)

THE COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

NOTICE TO EMPLOYEES

Posted by Order of
The Massachusetts Labor Relations Commission
An Agency of the Commonwealth of Massachusetts

The Massachusetts Labor Relations Commission has determined that the Bridgewater Education Association, Wareham Education Asociation and the Fairhaven Education Association violated Sections 12 and 10(b)(1) of M.G.L. c.150E by failing to provide the Charging Parties with a local audit for the fiscal years preceding the periods for which the agency service fees referred to in this case, were demanded.

WE WILL NOT do anything that interferes with, restrains, or coerces any employee in the exercise of their rights guaranteed under M.G.L. c.150E.

WE WILL NOT seek the discharge of or any other sanction against any Charging Party for failing to pay an agency service fee for the 1988-89 school year, or against Betsy Ann Wood for the 1987-1988 school year, that was based on the invalid demands.

WE WILL release to the Charging Parties all of the monies held in joint escrow, plus all accrued interest to the date of the dissolution of the escrow account for the agency service fee for the 1988-89 school year, and to Betsy Ann Wood, all of the monies and interest for the agency service fees for the 1987-1988 and 1988-1988 school years.

WE WILL provide a local audit with any demand for a local agency service fee.

Bridgewater Education Association

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Commission's Office, 1604 Leverett Saltonstall Building, 100 Cambridge Street, Boston, Massachusetts (Telephone: 727-3505)

THE COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

NOTICE TO EMPLOYEES

Posted by Order of
The Massachusetts Labor Relations Commission
An Agency of the Commonwealth of Massachusetts

The Massachusetts Labor Relations Commission has determined that the Bridgewater Education Association, Wareham Education Association and the Fairhaven Education Association violated Sections 12 and 10(b)(1) of M.G.L. c.150E by failing to provide the Charging Parties with a local audit for the fiscal years preceding the periods for which the agency service fees referred to in this case, were demanded.

WE WILL NOT do anything that interferes with, restrains, or coerces any employee in the exercise of their rights guaranteed under M.G.L. c.150E.

WE WILL NOT seek the discharge of or any other sanction against any Charging Party for failing to pay an agency service fee for the 1988-89 school year, or against Betsy Ann Wood for the 1987-1988 school year, that was based on the invalid demands.

WE WILL release to the Charging Parties all of the monies held in joint escrow, plus all accrued interest to the date of the dissolution of the escrow account for the agency service fee for the 1988-89 school year, and to Betsy Ann Wood, all of the monies and interest for the agency service fee for the 1987-1988 and 1988-1988 school years.

WE WILL provide a local audit with any demand for a local agency service fee.

Wareham Education Association

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Commission's Office, 1604 Leverett Saltonstall Building, 100 Cambridge Street, Boston, Massachusetts (Telephone: 727-3505)

APPENDIX C

GENERAL LAWS OF MASSACHUSETTS

Chapter 150E: Section 12. Service fee; imposition; amount; discrimination.

Section 12. The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, of a service fee to the employee organization which in accordance with the provisions of this chapter, is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such employee is employed; provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting.

Prior to the vote, the exclusive bargaining agent shall make reasonable efforts to notify all employees in the unit of the time and place of the meeting at which the ratification vote is to be held, or any other method which will be used to conduct the ratification vote. The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or received. No employee organization shall receive a service fee as provided herein unless it has established a procedure by which any employee so demanding may obtain a rebate of that part of said employee's service

payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for:

(1) contributions to political candidates or political committees formed for a candidate or political party;

(2) publicizing of an organizational preference for a candidate for political office;

(3) efforts to enact, defeat, repeal or amend legislation unrelated to the wages, hours, standards of productivity and performance, and other terms and conditions of employment, and the welfare or the working environment of employees represented by the exclusive bargaining agent or its affiliates;

(4) contributions to charitable, religious or idealogical causes not germane to its duties as the exclusive bargaining agent;

(5) benefits which are not germane to the governance or duties as bargaining agent, of the exclusive bargaining agent or its affiliates and available only to the members of the employee organization.

It shall be a prohibited labor practice for an employee organization or its affiliates to discriminate against an employee on the basis of the employee's membership, nonmembership or agency fee status in the employee organization or its affiliates.

Supreme Court, U.S.
FILED
NOV 12 1999
OFFICE OF THE CLERK

No. 99-643

IN THE

Supreme Court of the United States

WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
and FAIRHAVEN EDUCATORS' ASSOCIATION,

Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION,
DAVID DUPUIS, ELEANOR DUPUIS, BETSY ANN WOOD,
CHARLES CIPOLLINI, and PETER ANTHONY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE N. CAMERON
(Counsel of Record)
GLENN M. TAUBMAN
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road
Springfield, VA 22160
(703) 321-8510

Attorneys for Respondent Individual Teachers

November 1999

QUESTIONS PRESENTED

1. Whether a small, affiliated union, or an individual nonmember, should bear the burden of verifying the union's financial information when reliable information is necessary to competently evaluate the union's agency fee demand?

2. Whether independent and adequate state grounds exist to support the decision below?

3. Where a union is found by an administrative agency to have violated a state statute by the manner in which it demanded compulsory union fees, may the administrative remedy include temporary forfeiture of the fee until such time as the union submits a legally proper demand?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE PETITION 9

I. Petitioners Cannot Point to a Seam, Much Less a Split, in the Solid Screen of Adverse Decisions Below 9

II. Transaction Costs Cannot Defeat Free Speech Rights 12

III. The Decision Below Also Rests on Independent State Grounds 14

IV. This Court Does Not Sit to Revisit the Discretionary Remedial Decisions of a State Administrative Agency 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases ***Page***

Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987) 9, 12, 13, 14

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 14

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) ..... *passim*

Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987) 9

Dashiell v. Montgomery Cty., 925 F.2d 750 (4th Cir. 1991) 9

Ferriso v. NLRB, 125 F.3d 865 (D.C. Cir. 1997) 9

Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964) 15

Hohe v. Casey, 956 F.2d 399 (3d Cir. 1992) 9

Hurley v. Irish-American Gay Group, 515 U.S. 557 (1995) 12

Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807 (9th Cir. 1997), *cert. denied*, 524 U.S. 904 (1998) 9

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 12

TABLE OF AUTHORITIES - continued

Cases ***Page***

Lowary v. Lexington Local Bd. of Educ.,
903 F.2d 422 (6th Cir. 1990), *cert. denied*,
498 U.S. 958 (1990) 9, 14

Lowary v. Lexington Local Bd. of Educ.,
704 F. Supp. 1461 (N.D. Ohio 1988) 9

Malden Educ. Ass'n, 15 MLC 1029 (1988) 16

Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986) 12

Ping v. National Educ. Ass'n, 870 F.2d 1369
(7th Cir. 1989) 9

Prescott v. County of El Dorado, 177 F.3d 1102
(9th Cir. 1999) 12

School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982) 13

School Comm. of Newton v. Labor Relations Comm'n, 388 Mass. 557 (1983) 15

Shea v. International Ass'n of Machinists,
154 F.3d 508 (5th Cir. 1998) 12

Springfield Educ. Ass'n (Belhumeur), 23 MLC 247
(1997) 11

Tashjian v. Republican Party of Conn., 479 U.S. 208
(1986) 13

TABLE OF AUTHORITIES - continued

Cases ***Page***

Therrien v. Labor Relations Comm'n,
390 Mass. 644, 459 N.E.2d 88 (1983) 15

Tierney v. City of Toledo, 917 F.2d 927
(6th Cir. 1990) 9

*Wareham Educ. Ass'n v. Labor Relations
Comm'n*, 430 Mass. 81, 713 N.E.2d 363 (1999) 1

Zacchini v. Scripps-Howard Broadcasting Co.,
433 U.S. 562 (1977) 14

Constitutional and Statutory Provisions

U.S. Const. amend. I ..... *passim*

28 U.S.C. § 1257 (a) 1

29 U.S.C. § 160 (c) 15

Mass. G.L. c. 150E 15

Mass. G.L. c. 150E § 11 ..... 2, 15

Mass. G.L. c. 150E § 12 ..... 2, 5, 15

TABLE OF AUTHORITIES - continued

Miscellaneous ***Page***

Arthur L. Bowker, *Trust Violators in the Labor Movement: A Study of Union Embezzlement,* 19 J. Lab. Res. 571 (1998) 7, 10

IN THE

Supreme Court of the United States

No. 99-643

WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
and FAIRHAVEN EDUCATORS' ASSOCIATION,

Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION,
DAVID DUPUIS, ELEANOR DUPUIS, BETSY ANN WOOD,
CHARLES CIPOLLINI, and PETER ANTHONY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision and order of the Massachusetts Labor Relations Commission is reported at 24 Massachusetts Labor Cases 23 (1997). The decision and order of the Massachusetts Supreme Judicial Court is reported at 430 Mass. 81, 713 N.E.2d 363 (1999). Both opinions are set forth in the appendix to the Petition for Writ of Certiorari.

JURISDICTION

To the extent this Court has jurisdiction, it is based on 28 U.S.C. § 1257 (a). Respondents argue below this Court lacks jurisdiction based on the independent and adequate state grounds for the decisions below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Massachusetts General Laws chapter 150E § 11 says in pertinent part:

> If, upon all the testimony, the commission determines that a prohibited practice has been committed, it shall state its findings of fact and shall issue and cause to be served on the party committing the prohibited practice an order requiring it or him to cease and desist from such prohibited practice, and shall take such further affirmative action as will comply with the provisions of this section, including but not limited to the withdrawal of certification of an employee organization established by or assisted in its establishment by any such prohibited practice. It shall order the reinstatement with or without back pay of an employee discharged or discriminated against in violation of the first paragraph of this section.

Massachusetts General Laws chapter 150 E § 12 states:

> The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, of a service fee to the employee organization which in accordance with the provisions of this chapter, is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such

employee is employed; provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting.

Prior to the vote, the exclusive bargaining agent shall make reasonable efforts to notify all employees in the unit of the time and place of the meeting at which the ratification vote is to be held, or any other method which will be used to conduct the ratification vote. The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or received. No employee organization shall receive a service fee as provided herein unless it has established a procedure by which any employee so demanding may obtain a rebate of that part of said employee's service payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for:

(1) contributions to political candidates or political committees formed for a candidate or political party;

(2) publicizing of an organizational preference for a candidate for political office;

(3) efforts to enact, defeat, repeal or amend legislation unrelated to the wages, hours, standard of productivity and performance, and other terms and conditions of employment, and the welfare or the working environment of employees represented by the exclusive bargaining agent or its affiliates;

(4) contributions to charitable, religious or ideological causes not germane to its duties as the exclusive bargaining agent;

(5) benefits which are not germane to the governance or duties as bargaining agent, or the exclusive bargaining agent or its affiliates and available only to the members of the employee organization.

It shall be a prohibited labor practice for an employee organization or its affiliates to discriminate against an employee on the basis of the employee's membership, nonmembership or agency fee status in the employee organization or its affiliates.

STATEMENT OF THE CASE

Facts: David and Eleanor Dupuis are teachers in the Bridgewater public schools. Betsy Ann Wood is a teacher in the Wareham public schools. Charles Cipollini and Peter Anthony are teachers in the Fairhaven public schools. Mr. and Mrs. Dupuis, Ms. Wood, Mr. Cipollini and Mr. Anthony (hereinafter collectively referred to as "teachers") are subject to collective bargaining agreements entered into by, respectively, the Bridgewater Education Association ("BEA"), the Wareham Education Association ("WEA") and the Fairhaven Educators Association ("FEA").

The Bridgewater Education Association, the Wareham Education Association and the Fairhaven Educators Association (hereinafter collectively referred to as "associations" or "local unions") are affiliated on the state level with the Massachusetts Teachers Association ("MTA") and on the national level with the National Education Association ("NEA").

The teachers have not joined the associations or the associations' state and national affiliates. Nevertheless, they are required to pay agency fees to these unions and their affiliates as

a result of collective bargaining agreements between their employers and the unions.

Although employers and unions are allowed to enter into agency fee agreements in the Commonwealth of Massachusetts, they are not required to do so. (G.L. c. 150E § 12) As a result, most of the local affiliates of the MTA have not entered into agreements which coerce support from nonmembers.[1]

The smaller the local affiliate, the less likely it is to enter into compulsory fee agreements with the employer. Almost two-thirds of the local affiliates of the MTA (196) are smaller than the smallest of the three local unions (i.e., WEA) involved in this case. Of those 196 small locals, fewer than one-third (62) have entered into coercive agreements. Of those 62, only 27 represent teachers who have not joined the union.

Beginning in 1989, the local unions demanded that the teachers pay an agency fee which generally equaled the amount of dues paid by voluntary union members.[2]

---

[1] Out of 300 local affiliates, only 137 have agency fee agreements.

[2] Dues for the Bridgewater Education Association for the year at issue were $299, of which $30 was retained by the BEA, $191 was sent to the MTA and $78 was forwarded to the NEA. The agency fees demanded of the Dupuis for that same year were $275.45, of which $30 was retained by the BEA, $186.95 was sent to the MTA and $58.50 was forwarded to the NEA.

Dues for the Wareham Education Association for the 1987-88 school year were $283, of which $30 was retained by the WEA, $178 was sent to the MTA and $75 was forwarded to the NEA. The agency fee demanded of Ms. Wood for that same year was $242.63, of which $29.18 was retained by the WEA, $157.57 was sent to the MTA and $55.88 was forwarded to the NEA. The dues for the Wareham Education Association for the 1988-89 school year were $299, of which $30 was retained by the WEA, $191 was sent to the MTA and $78 was forwarded to the NEA. The agency fee demanded of Ms. Wood for 1988-89 was $262.73, of which $30 was retained by the WEA,

(continued...)

The local unions' fee demands were not accompanied by an audit of their financial books and records. An audit would allow the teachers to have a trustworthy basis on which to review the local unions' actual expenditures to decide whether they thought the fee demand was excessive. The fee demands provided some unaudited financial information, but did not disclose all union expenditures.

For objecting nonmembers like the teachers, the local unions' state and national affiliates calculated a reduced agency fee that was less than the dues paid by voluntary union members. These calculations included audits of the affiliates' books and records.

The MTA, the state affiliate which receives the lion's share of the compelled fees, "rebates" a portion of these fees to the local in what it terms "local office support." This local office support, which can be up to 50% of total local expenses, carries some strings with it. One of those "strings" is that the local affiliate cedes to the MTA the authority to require an audit of the local's books "in the event the MTA deems it necessary."

The authority of the MTA to require audits of its local affiliates became a matter of internal controversy after this case was filed. The MTA employs what it calls "regional services consultants" to handle relationships with the local affiliates. One MTA regional services consultant, Charles Baldwin, became alarmed when he noticed that both "malfeasance" and

---

[2] (...continued)
$174.23 was sent to the MTA and $58.50 was forwarded to the NEA.

The dues for the Fairhaven Education Association for the year at issue were $314, of which $45 was retained by the FEA, $191 was sent to the MTA and $78 was forwarded to the NEA. The agency fees demanded of Mr. Anthony and Mr. Cipollini for that year were $290.45, of which $45 was retained by the FEA, $186.95 was sent to the MTA and $58.50 was forwarded to the NEA.

"nonfeasance" were taking place when it came to the handling of money by local affiliates.

Mr. Baldwin wrote a letter to MTA's Executive Director (with a copy to the General Counsel and others) relating his experience, and reporting that he consulted with Mike O'Neil, a C.P.A. employed by the MTA, and learned from him of a list of other MTA locals which had similar problems. Baldwin suggested that a way to combat this serious problem was to "make it disadvantageous for our locals not to have their books audited each year."

The teachers have an independent basis for fearing that locals have something to hide from the knowledgeable eyes of experts. When the FEA was required to bring its financial books and records to a Labor Relations Commission hearing, the FEA refused (on advice of MTA counsel) to produce the books and records to the nonunion teachers if those teachers insisted upon being aided in the matter by their own attorney.

Nationwide, there is a rising concern about the trustworthiness of the financial records of small unions. According to one published study, when it comes to officer embezzlement of union funds, "[t]he vast majority of all victim labor organizations, 78 percent, were local unions." Arthur L. Bowker, *Trust Violators in the Labor Movement: A Study of Union Embezzlement*, 19 J. Lab. Res. 571, 574 (1998). Indeed, the introduction to this study summarized part of the findings that, "victim unions were small in financial and membership size." *Id.* at 571.

These same concerns exist here. In one local, the auditors had to work on the accounting records to bring them to the point where they could be audited. According to an MTA employee and an MTA auditor, at least eight MTA locals suffered from malfeasance and nonfeasance on the part of local officers when handling funds.

It takes a certain minimal amount of time, even for trained professionals, to determine if a small union's financial

records are trustworthy. The local unions' own expert testified that he would budget 60 hours to audit a small local. In its decision, the Massachusetts Labor Relations Commission recounted the steps a certified public accountant takes in determining whether a union's financial statements are trustworthy. These include confirming the amount of financial transactions with outside banks and vendors. (Appendix to Petition "App." at 30a-31a) Obviously, this test would take longer for a teacher who is untrained in the science of auditing financial records—assuming such testing with banks and vendors would even be possible.

Proceedings Below: After the teachers received the agency fee demands which failed to include an audit of local union expenses, they timely filed prohibited practice charges with the Massachusetts Labor Relations Commission challenging the procedures by which the local unions demanded their agency fees, and other matters not pertinent here. The charges raised the constitutional and state statutory right of the teachers to receive from the local unions audited information so they could gauge the propriety of the unions' fee demands.

The Commission issued a complaint alleging that these three local unions did not provide the teachers "with an independent auditor's financial statement of its revenues and expenses for the fiscal year preceding the period for which the fee was demanded." Since the local unions had not provided the teachers with any audited financial information at the time of the agency fee demand, the Commission's allegation was admitted by all three unions. The local unions did not plead any affirmative defense to their failure to provide an audit to the teachers.

The Commission held several hearings. Recommended Findings of Fact were issued by Commissioner William Dalton on October 28, 1996. A unanimous final decision and order was handed down by the Commission on October 29, 1997, holding that the local unions violated state law by failing to provide audited financial information to the teachers. Upon the request of the local unions, the Supreme Judicial Court granted direct

review of the Commission's decision. On July 15, 1999, the Supreme Judicial Court unanimously affirmed the decision of the Commission.

REASONS FOR DENYING THE PETITION

I. PETITIONERS CANNOT POINT TO A SEAM, MUCH LESS A SPLIT, IN THE SOLID SCREEN OF ADVERSE DECISIONS BELOW.

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), this Court determined that a union must provide an audit of its books and records whenever it makes an agency fee demand upon nonmembers. Specifically, this Court required that the union's "major categories of expenses" be disclosed "as well as verification by an independent auditor." (*Id.*)

A phalanx of federal circuit courts have reaffirmed the *Hudson* audit requirement. None have rejected it for public employees. Second Circuit: *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); Third Circuit: *Hohe v. Casey*, 956 F.2d 399, 415 (3d Cir. 1992); Fourth Circuit: *Dashiell v. Montgomery Cty.*, 925 F.2d 750, 756-57 (4th Cir. 1991); Sixth Circuit: *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 431-32 (6th. Cir. 1990), *cert. denied*, 498 U.S. 958 (1990); *Tierney v. City of Toledo*, 917 F.2d 927, 933-36 (6th Cir. 1990); *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987); Seventh Circuit: *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1374 (7th Cir. 1989) (quoting *Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1461, 1466 (N.D. Ohio 1988)); Ninth Circuit: *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 813 (9th Cir. 1997), *cert. denied*, 524 U.S. 904 (1998); D.C. Circuit: *Ferriso v. NLRB*, 125 F.3d 865, 867-72 (D.C. Cir. 1997).

Petitioner local unions acknowledge this unanimity by candidly confessing that it is "well established" that "an independent audit of the expenditures on which the agency fee is based must be provided to fee payers." (Pet. at 14)

The audit requirement is not some arcane technical standard. Both the Supreme Judicial Court of Massachusetts and the Massachusetts Labor Relations Commission acknowledged the basis for the requirement of audited information is to allow nonmembers some measure of assurance the local unions' financial information is *reliable*. (App. at 10a-11a; 40a-41a)

This concern about reliability is magnified in small locals. As mentioned above, the Bowker study found that when it came to financial improprieties, "victim unions were small in financial and membership size." Bowker, 19 J. Lab. Res. at 571.

These kinds of concerns about small unions have proven well founded in Massachusetts. The trial revealed auditors had to work on the accounting records of one local to bring it to the point where it could be audited. According to a union employee and a union auditor, at least eight locals of the MTA suffered from malfeasance and nonfeasance on the part of local officers when handling funds.

Indeed, the local unions' expert witness testified that in "most" small locals one person handles all the accounting and, therefore, the expert could not place any reliance on union "internal controls."

Since reliable financial information is at the heart of the *Hudson* procedure, and the "Achilles' heel" of small union finances is reliability, the question becomes who should bear the burden of determining the veracity of the local unions' financial records?

While the local unions can limit their financial burden to $30 (the amount they collect), the financial burden on the teacher seeking to protect First Amendment rights is significant. The Massachusetts Labor Relations Commission recounted the steps a certified public accountant takes to determine whether a union's financial statements are trustworthy. These include confirming the amount of financial transactions with outside banks and vendors. (App. at 30a-31a) The unions' expert witness

testified that he would budget 60 hours to audit a small local. This means that highly-trained professionals are required to expend at least $2,000 worth of their time to review the accounting records of the Wareham Education Association to determine whether the records can be relied upon.

Should Betsy Ann Wood (the Wareham nonmember) be required to invest, at a minimum, 60 hours of her time to determine whether the WEA's financial records are adequate for her to gauge the propriety of its claim to $30.00 of her money? Hardly! This is the essence of an unconstitutional burden on free speech rights.[3]

No proper consideration of the burden on these small locals would be complete without a consideration of their large state and national affiliates. The local unions' affiliates are a large and ready source of financial help. The MTA has an annual income of nearly $13 million and the NEA has an annual income of almost $118 million. The MTA not only has the authority to require audits of its local affiliates, the record shows it has paid for them in the past.

These local unions charge the teachers for all three levels of the "unified" organization, on the basis that support for the large state and national affiliates is essential to having the proper resources for effective collective bargaining. The ability of these affiliates to bring their "considerable economic" resources to bear to help locals in need is the precise reason this Court ruled

---

[3] The local unions disingenuously suggest (Pet. at 20) that the requirement of providing reliable audited financial information to nonmembers is not important because they can skip "virtually cost-free and risk-free" to the next stage of the *Hudson* procedure - which is the trial. A trial on the amount of the state affiliate's agency fee has already taken place. *Springfield Educ. Ass'n (Belhumeur)*, 23 MLC 247 (1997). Although that case is on appeal, the nonmembers in that case proved the affiliate's demands were illegally high. The procedure took approximately eight years, 53 days of trial and $50,000 in court reporters' fees to say nothing of attorney resources.

nonmembers can be compelled to support all three levels of the union hierarchy. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 523 (1991).

Affiliate resources, however, are a topic the local unions would like to avoid when it comes to claiming "burden." This Court must not close its eyes, when evaluating claims of "burden," to the collections operation or the multilevel, interlocking nature of these unions. *Andrews*, 829 F.2d at 340 n. 2.

In a desperate search for any aberration in the solid wall of adverse precedent and common sense protection for nonmembers' rights, the local unions claim that *Prescott v. County of El Dorado,* 177 F.3d 1102 (9th Cir. 1999) "would appear to sanction the financial disclosure provided by [the local unions] in this case." (Pet. at 16)

That brings us to the essence of this Petition. Against a solid wall of adverse precedent, the most the local unions can say is that *Prescott appears* to support them. Appearance has proven deceiving to the local unions, for the Supreme Judicial Court of Massachusetts relied upon *Prescott* in ruling against them. (App. at 10a)

II. TRANSACTION COSTS CANNOT DEFEAT FREE SPEECH RIGHTS.

"[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 16 (1986). The teachers here do not want to join these unions and do not want to support their political and ideological activities.

These are "core" First Amendment concerns. *Lehnert* 500 U.S. at 516; *Shea v. International Ass'n of Machinists,* 154 F.3d 508, 517 (5th Cir. 1998) (Nonunion employees who call upon the court in this type of case "to protect the[ir] free speech

rights ... from intrusive union procedures ... [raise] rights whose protection are at or near 'the core' of the First Amendment").

The fundamental First Amendment rights involved in this litigation require that prophylactic procedures "be carefully tailored to minimize the infringement." *Hudson*, 475 U.S. at 303.

The state courts of Massachusetts have determined that the teachers' stake in this litigation is their free speech rights while the unions' stake is "only [to] funds to which [they are] entitled by statute and agreement." *School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 84, 431 N.E.2d 180, 189 (1982).[4]

In general, cost considerations are not a sufficient basis to defeat First Amendment claims. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986).

Specifically, the Second Circuit has ruled that burden is not a proper defense to the required *Hudson* procedures:

> [T]he district court should not have approached this question with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests. We believe that the procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops regardless of whether the union believes them to be excessively costly. Excessive cost cannot form the basis for allowing the union or the government to avoid *Hudson's* requirement ....

---

[4] It is probably more accurate to say that the unions' interest is only contractual. The court below noted that Massachusetts law only permits, and does not mandate, union security agreements. (App. at 9a) Reflected in the record is the fact that most of the MTA's locals have not entered into agency fee agreements.

Andrews 829 F.2d at 339.

The Sixth Circuit, after quoting from *Andrews,* opined:

> Although it may be somewhat burdensome on the unions, full disclosure of financial information is a minimal requirement in exchange for this interference. *Hudson* and a due regard for First Amendment values lead to this conclusion.

Lowary, 903 F.2d at 432.[5]

If the amount of money at issue were a cognizable concern, this Court in *Hudson* would not have imposed the constitutionally required procedures with this note: "The amount at stake for each individual dissenter does not diminish this concern [about the risk that constitutional rights will be violated]. For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." *Hudson,* 475 U.S. at 305.

III. THE DECISION BELOW ALSO RESTS ON INDEPENDENT STATE GROUNDS.

If there are adequate and independent state grounds for the decision of a state court, this Court is deprived of jurisdiction. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 565-68 (1977); *Black v. Cutter Laboratories,* 351 U.S. 292, 297-99 (1956). In the court below, the Massachusetts Labor Relations Commission vehemently argued:

> The Unions conveniently ignore the fact that the Commission's decision here rests not only on the First Amendment requirements ... but also rests

---

[5] The defendant local union in *Lowary* was less than one-third the size of the smallest union here.

on the Commission's application of the broad policies underlying the language of Section 12 of Chapter 150 E.

The local unions' Petition fails to mention, much less discuss, the jurisdictional problems presented by the Commission's decision to rest its opinion not only upon First Amendment requirements, but also upon the Commission's application of the broad policies underlying the Massachusetts labor statute, G.L. c. 150E. The Commission argued before the court below that its decision was based upon "sound labor policy" and its opinion stated its audit requirement for small locals was a result of recognizing and accommodating "divergent interests when interpreting and applying the Law." (App. at 42a)

IV. THIS COURT DOES NOT SIT TO REVISIT THE DISCRETIONARY REMEDIAL DECISIONS OF A STATE ADMINISTRATIVE AGENCY.

Remedial decisions of the National Labor Relations Board are subject to limited judicial review. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 216 (1964). The Massachusetts Supreme Judicial Court has ruled the Massachusetts Labor Relations Commission has similar discretionary statutory authority under state law (compare 29 U.S.C. § 160 (c) with Mass. G.L. c. 150E § 11), when it comes to questions of remedy. *Therrien v. Labor Relations Comm'n,* 390 Mass. 644, 648, 459 N.E.2d 88, 91 (1983); *School Comm. of Newton v. Labor Relations Comm'n,* 388 Mass. 557, 580 (1983).

There is no abuse of discretion in the Commission's remedial decision. The Commission has not denied the local unions the ability to require reimbursement for their collective bargaining expenses at some future time. It has only released the teachers' money from escrow based on the local unions unlawful demand. (App. at 43a: "Cease and desist from requiring the Charging Parties to pay an agency service fee ... based on the invalid demands.")

The local unions can make a new agency fee demand when they comply with the constitutionally required procedures. The Commission places essentially no restrictions on a union's ability to continue making agency fee demands on nonmembers, even though earlier demands were illegal.

Malden Education Association, 15 MLC 1029 (1988) is instructive. In that case, the Malden Education Association made four agency fee demands upon a nonmember for the same year (1983-84). These demands were made on September 19, 1983, November 18, 1983, February 29, 1984 and November 9, 1984. *Id.* at 1032. The Commission held that the first two demands were illegal because the union had not filed the proper financial information. *Id.* at 1035, 1037. However, when the union later filed the proper financial information, the Commission determined the third and fourth demands to be valid. *Id.* at 1035.

In its argument to the court below, the Massachusetts Labor Relations Commission stated: "[n]one of [the cases cited by the local unions] arose under a regulatory scheme like that in Massachusetts where a union's right to collect a fee is only triggered by a valid demand." To the extent that a union has a right to collect a fee from Massachusetts teachers, the Commission's decision does nothing to thwart that right. Instead, it simply requires that right to be enforced in a way that is consistent with state law and the First Amendment.

A remedial decision, based upon a state regulatory scheme, is beyond the purview of this Court.

CONCLUSION

The local unions present no meritorious reason for a writ of certiorari in this case. With respect to all issues the local unions have raised, the decision of the Supreme Judicial Court either rested on adequate and independent state law grounds or correctly followed the applicable decisions of this Court. The court below properly affirmed the state remedial determination of the administrative agency. The local unions cannot point to any conflict among the courts of appeals concerning the issues and no real conflict exists concerning this issue. Therefore, the local unions' Petition should be denied.

Respectfully submitted,

Bruce N. Cameron
Counsel of Record
Glenn M. Taubman
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Attorneys for Respondent
Individual Teachers

November 1999

(3)

No. 99-643

Supreme Court, U.S.
FILED
NOV 26 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
and FAIRHAVEN EDUCATORS' ASSOCIATION,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION,
DAVID DUPUIS, ELEANOR DUPUIS, BETSY ANN WOOD,
CHARLES CIPOLLINI, and PETER ANTHONY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITIONERS' REPLY BRIEF

ANN CLARKE
Massachusetts Teachers Ass'n
20 Ashburton Place
Boston, MA 02108
(617) 742-7950

ROBERT H. CHANIN
(Counsel of Record)
JOHN M. WEST
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THIS COURT SHOULD REVIEW THE DECISION BELOW IN ORDER TO CORRECT THE MISREADING OF *HUDSON* THAT RENDERS ILLUSORY THE RIGHT OF SMALL UNIONS TO COLLECT AGENCY FEES BY IMPOSING TRANSACTION COSTS FAR IN EXCESS OF THE AMOUNT OF THE FEES AT STAKE	1
II. THIS COURT SHOULD RESOLVE THE CONFLICT IN AUTHORITY CREATED BY THE DECISION BELOW CONCERNING THE APPROPRIATE REMEDY FOR A UNION'S FAILURE TO PROVIDE A CONSTITUTIONALLY ADEQUATE NOTICE OF THE BASIS FOR ITS AGENCY FEE	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)	2
Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987)	5
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986)	*passim*
Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987)	5
Dashiell v. Montgomery County, 925 F.2d 750 (4th Cir. 1991)	5
Ferriso v. NLRB, 125 F.3d 865 (D.C. Cir. 1997)	5
Gilpin v. AFSCME, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989)	4
Hohe v. Casey, 956 F.2d 399 (3d Cir. 1992)	6
Knight v. Kenai Penninsula Borough School Dist., 131 F.3d 807 (9th Cir. 1997), *cert. denied*, 524 U.S. 904 (1998)	5
Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990)	6
Michigan v. Long, 463 U.S. 1032 (1983)	6, 7
Ohio v. Robinette, 519 U.S. 33 (1996)	6
Pennsylvania v. Labron, 518 U.S. 938 (1996) (per curiam)	6
Ping v. NEA, 870 F.2d 1369 (7th Cir. 1989)	5
Prescott v. County of El Dorado, 177 F.3d 1102 (9th Cir. 1999)	5
Tashjian v. Republican Party, 479 U.S. 208 (1986)	2, 3
Tierney v. City of Toledo, 917 F.2d 927 (6th Cir. 1990)	5

STATUTES	
Mass. Gen. L. ch. 150E, § 12	7

IN THE

Supreme Court of the United States

No. 99-643

WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
and FAIRHAVEN EDUCATORS' ASSOCIATION,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION,
DAVID DUPUIS, ELEANOR DUPUIS, BETSY ANN WOOD,
CHARLES CIPOLLINI, and PETER ANTHONY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITIONERS' REPLY BRIEF

ARGUMENT

Although respondent Massachusetts Labor Relations Commission has not filed a brief in opposition to the petition for certiorari, the individual respondents ("respondents") have done so. We offer the following observations in response to their Brief in Opposition ("Opp.").

I. THIS COURT SHOULD REVIEW THE DECISION BELOW IN ORDER TO CORRECT THE MISREADING OF *HUDSON* THAT RENDERS ILLUSORY THE RIGHT OF SMALL UNIONS TO COLLECT AGENCY FEES BY IMPOSING TRANSACTION COSTS FAR IN EXCESS OF THE AMOUNT OF THE FEES AT STAKE

A. Perhaps more so than in many other areas of the law, the jurisprudence of agency fee is replete with pro-

phylactic rules, designed to prevent violations of feepayers' First Amendment rights. As we explained in our Petition ("Pet."), this Court has repeatedly emphasized that, in crafting such rules, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986).

Respondents go to war with this fundamental notion that there are two interests at stake that must be taken into account in devising such prophylactic rules, insisting instead that their interests trump all others. In what could stand as the theme of their Brief in Opposition, respondents assert flatly that "TRANSACTION COSTS CANNOT DEFEAT FREE SPEECH RIGHTS," Opp. at 12—no matter how high those transaction costs, no matter how disproportionate they are to the amount of fees at stake, and no matter what methods other than audited financial statements may be available to provide nonmembers with adequate financial disclosure as to the agency fees they are asked to pay.

Respondents cite, for example, *Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986), for the proposition that "cost considerations are not a sufficient basis to defeat First Amendment claims." Opp. at 13. But a willingness to take into account cost and burden in determining what prophylactic measures are necessary to protect a First Amendment right is not at all the same thing as "defeat-[ing]" that right. What was at issue in *Tashjian* was a statute that infringed a political party's First Amendment rights by prohibiting it from conducting open primary elections; the Court held that the additional expense to

the state of administering such primaries was "not a sufficient basis here for infringing appellees' First Amendment rights." 479 U.S. at 218.

At issue in this case, by contrast, is *not* a feepayer's First Amendment right to refuse to pay for union expenditures for non-bargaining-related activities to which he or she objects. Rather, the question is what kind of information petitioner unions must give respondents in order to enable them meaningfully to exercise that right. That is an important question, but it is not answered simply by observing that a First Amendment right is involved.

To the contrary, it in no way does violence to the First Amendment to suggest that a different prophylactic disclosure rule may be appropriate for very small unions than for larger ones. Indeed, the footnote from *Hudson* that is at issue here suggests as much, implicitly envisioning that the union's burden of providing financial disclosure to feepayers might be met in more than one way. The Court's observation that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures," 475 U.S. at 307 n.18, doubtless was—in view of the 26,000-member union that was before it in that case—based on the assumption that providing such an "exhaustive and detailed list" would be far more onerous than the option, which the Court sanctioned, of providing "the major categories of expenses, as well as verification by an independent auditor." *Id.* But where, for small unions like petitioners, the alternative of offering instead full access to the union's books—as was done here—is in fact far less burdensome, and provides sufficient information to the nonmember, *see* Pet. at 19, it follows from *Hudson*'s logic that such financial disclosure should satisfy the union's burden.

B. Respondents raise two factual issues related to the balance between the burden on the union of providing

additional information and the risk the feepayer may suffer from inadequate information. First, respondents take issue with our observation, *see* Pet. at 20, that it costs the feepayer nothing to challenge the amount of the agency fee, citing the expense of a recent proceeding before the Massachusetts Labor Relations Commission ("Commission") involving the agency fees of the Massachusetts Teachers Association ("MTA"). Opp. at 11 n.3. Respondents miss the point. The purpose of *Hudson*'s financial disclosure requirement is, as the court below observed, "to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined." App. 11a. The feepayer can do that by invoking the "rebate procedure" established by the union, under which an impartial decisionmaker appointed by the American Arbitration Association determines whether the union has met its burden of proving the chargeability of the fees it seeks. To invoke this procedure, which *Hudson* requires unions to provide, *see* 475 U.S. at 307-08, a nonmember feepayer need only send a letter to the treasurer of the local association that represents him or her; the burden is then on the union to prove in the arbitration proceeding its entitlement to its fees. "[M]ounting [such] a challenge" thus is, as the Seventh Circuit has observed, "for all practical intents and purposes free." *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989).

Second, respondents imply that petitioner unions can be put to the expense of obtaining full audits, without regard to the disproportionate cost, because of their affiliation with state and national unions that presumably can pay for such audits. Opp. at 11-12. What respondents evidently fail to understand is the contractual nature of the relationship between local unions and their state and

national affiliates, each of which is an autonomous legal entity. The affiliation relationship simply does not, as respondents would have it, afford the local union the right to draw at will on the state or national union's treasury.[1]

C. Respondents cite a "phalanx of federal circuit courts," Opp. at 9, and a "solid wall of adverse precedent," *id.* at 12, in support of the position taken by the court below. But the truth is that, of that "phalanx" of cases cited at pages 9-12 of the Brief in Opposition, only two—*Andrews v. Education Ass'n of Cheshire*, 928 F.2d 335 (2d Cir. 1987), and *Prescott v. County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999)—even address the question presented here. And, as we explained in the Petition, those two cases point in opposite directions. *See* Pet. at 15-16.[2] Most of the rest of the "phalanx" simply contains boilerplate language citing this Court's *Hudson* opinion, while addressing issues unrelated to the local-audit question.[3]

---

[1] The record indicates that, on a single occasion in 1989, MTA for exceptional reasons paid the cost for four of its larger locals to obtain audits.

[2] Respondents note that the court below "relied upon *Prescott* in ruling against [petitioners]," Opp. at 12—without attempting to respond to our explanation of how the court misread the *Prescott* opinion. *See* Pet. at 16 n.10.

[3] Several of these cases address and reject the argument that the auditor must verify not only the union's expenditures but also its allocation of those expenditures into chargeable and nonchargeable categories. *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991); *Ping v. NEA*, 870 F.2d 1369 (7th Cir. 1989). One holds that *Hudson*'s audit requirement applies under the National Labor Relations Act. *Ferriso v. NLRB*, 125 F.3d 865 (D.C. Cir. 1997). In *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987), no audit issue was presented at all. The audit issues in *Tierney v. City of Toledo*, 917 F.2d 927 (6th Cir. 1990), concerned the independence of the auditor, and whether the auditor could be subpoenaed in subsequent litigation. And in *Knight v. Kenai Peinsula Borough School Dist.*,

D. Respondents' assertion that the decision below rests on independent state grounds is, quite simply, frivolous. Respondents appear blissfully unaware of this Court's cases dealing with "adequate and independent state grounds"; and, contrary to their assertion, Opp. at 15, the Petition does indeed address precisely the issues on which federal jurisdiction depends. *See* Pet. at 9-10. That review of the holdings of both the Commission and the Supreme Judicial Court makes plain beyond peradventure that the decision of the court below "fairly appears to rest primarily on federal law, or to be interwoven with the federal law." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Under these circumstances, this Court "accept[s] as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041. Indeed, the question here is not even a close one. The state court's holding rests on an analysis of the requirements of *Hudson*, and the only state precedents cited by the court are earlier cases in which it interpreted *Hudson*. *See* Pet. at 9 & n.7. *Cf. Ohio v. Robinette*, 519 U.S. 33, 37 (1996); *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996) (per curiam).

Without reference to any post-*Long* decision of this Court—and, indeed, without citing anything in the decision of the court from which certiorari is sought—respond-

---

131 F.3d 807 (9th Cir. 1997), *cert. denied*, 524 U.S. 904 (1998), the issue was whether certain expenditures of the national union had been audited, and whether the union's *Hudson* notice adequately informed feepayers of that fact. The only two cited cases (other than *Andrews* and *Prescott*) that address local-union issues at all—*Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990), and *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992)—both involved the "local presumption," which we discussed in the Petition. *See* Pet. at 15 n.9.

ents rely on litigation positions taken by the Commission in its briefing and argument before the Supreme Judicial Court. Opp. at 14-15. But even if these arguments about the "policies underlying the language of Section 12 of Chapter 150E," *id.* at 15, had been the basis for the Commission's decision—which they were not, *see* Pet. at 9—the arguments would be of no relevance both because they were in no way adopted by the Supreme Judicial Court in its opinion, and because, even if the court had cited such state policies, it would at most have led to a situation where the state court's decision was "interwoven with the federal law," rather than (as is in fact the case) "rest[ing] primarily [—indeed, entirely—] on federal law." *Long*, 463 U.S. at 1040.[4]

---

[4] We confine one additional point to the margin. In their Statement of the Case and a portion of their Argument, respondents attempt to color the legal issue with a tendentious and irrelevant portrayal of an alleged crisis of embezzlement among local unions in general and MTA local affiliates in particular. *See* Opp. at 6-7, 10. Prominently featured is the statistic that, of unions that suffered embezzlement by their officers, 78 percent were local unions. *Id.* at 7. What respondents pointedly omit from their account is the percentage of *all* unions that are local unions. While the record does not supply that information, there can be little doubt that the percentage is actually substantially higher than 78%. For example, the National Education Association has 53 state affiliates and approximately 14,000 local affiliates. Local unions thus constitute approximately 14,000 of the combined total of 14,054 local, state, and national unions, or 99.6%. If anything, then, respondents' research establishes that, comparatively speaking, local unions are remarkably free from embezzlement activity.

Respondents' assertions with regard to MTA affiliates are equally misleading. Throughout this litigation, respondents have attempted to make a mountain of the fact that in 1990 and 1991 an MTA representative discovered and corrected two instances of financial improprieties on the part of local officers. One case involved a local treasurer's drawing stipends totaling $180 beyond the rate at which he should have been compensated; in the other, the local treasurer had allowed five checks from the school district to accumulate without depositing them. Both individuals, when confronted with their

II. THIS COURT SHOULD RESOLVE THE CONFLICT IN AUTHORITY CREATED BY THE DECISION BELOW CONCERNING THE APPROPRIATE REMEDY FOR A UNION'S FAILURE TO PROVIDE A CONSTITUTIONALLY ADEQUATE NOTICE OF THE BASIS FOR ITS AGENCY FEE

Respondents' argument with respect to the second question presented—the conflict between the remedial holding of the court below and the decisions of multiple federal circuits and state supreme courts on the appropriate remedy for a union's failure to provide adequate notice—appears to be largely a reprise of the "independent state grounds" issue just discussed. Respondents again rely, for their contention that the decision below "is beyond the purview of this Court," Opp. at 16, solely on arguments advanced by the Commission as a litigant in the court below, but not reflected in either the Commission's order or the court's opinion. *See id.* In point of fact, the opinion of the Supreme Judicial Court on this issue says nothing about the "discretionary statutory authority" of the Commission or the nature of the state "regulatory scheme." *Id.* at 15, 16. To the contrary, the court's holding on this point relies *exclusively* on federal precedents. *See* App. 12a-13a. There is, accordingly, no reason why this Court could not or should not review that holding and resolve the conflict in authority this issue presents.

---

actions, promptly resigned their offices. These incidents are no more indicative of a crime wave among MTA local unions—and no more relevant to the legal question presented—than is the "78%" figure respondents brandish. Equally offensive is respondents' attempt, Opp. at 10, to equate with criminal malfeasance the unsurprising fact that small organizations run exclusively by volunteers often do not have recordkeeping and accounting practices that would meet the standards of a professional accountant.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ANN CLARKE
Massachusetts Teachers Ass'n
20 Ashburton Place
Boston, MA 02108
(617) 742-7950

ROBERT H. CHANIN
(Counsel of Record)
JOHN M. WEST
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

Attorneys for Petitioners